TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 206 1923

FEDERAL TRADE COMMISSION, PLAINTIFF IN ERROR,

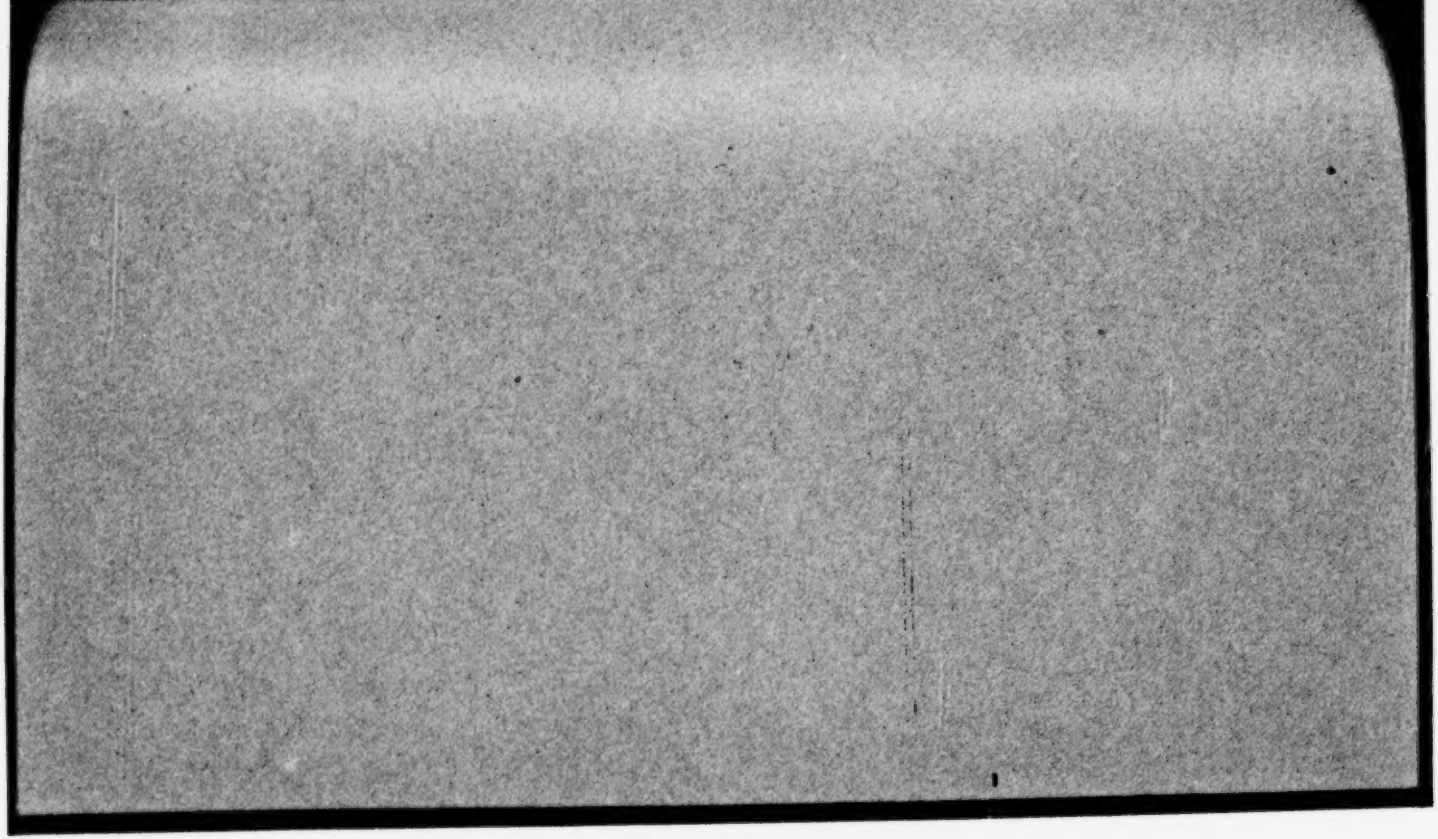
vs.

AMERICAN TOBACCO COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JANUARY 27, 1923.

(29365)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 815.

FEDERAL TRADE COMMISSION, PLAINTIFF IN ERROR,

vs.

AMERICAN TOBACCO COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 *Writ of error.*

(Filed Jan. 2, 1923.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the District Court of the United States for the Southern District of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The Federal Trade Commission, petitioner, & American Tobacco Company, Incorporated, respondent, a manifest error hath happened, to the great damage of the said The Federal Trade Commission, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Wm. H. Taft, Chief Justice of
2-3 the United States, the 2d day of January, in the year of our Lord one thousand nine hundred and twenty-three, and of the Independence of the United States the one hundred and forty-seventh.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

JNO. C. KNOX,
U. S. District Judge.

4 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

THE FEDERAL TRADE COMMISSION, PLFF. IN ERROR,
vs.
AMERICAN TOBACCO CO., INC., DEF. IN ERROR. } E. 24–63.

I, Alexander Gilchrist, Jr., clerk of the District Court of the United States of America for the Southern District of New York,

do hereby certify that the following is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, this ninth day of January, in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-seventh.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk.

5 *Equity subpœna.*

In United States District Court.

The President of the U. S. of America to American Tobacco Company, Incorporated:

You are hereby commanded to appear before the judges of the District Court of the U. S. of America for the Southern District of New York in the Second Circuit to answer a bill of complaint exhibited against you in the said court in a suit in equity by The Federal Trade Commission and to further do and receive what the said court shall have considered in this behalf; and this you are not to omit under penalty on you of two hundred and fifty dollars ($250).

Witness, Hon. Learned Hand, Judge of the District Court of the U. S. for the Southern District of New York, at the city of New York on the 14th day of June in the year one thousand nine hundred and twenty-two, and of the Independence of the United States the one hundred and forty-sixth.

ALEX. GILCHRIST, Jr.,
Clerk.

6 WM. HAYWARD,
U. S. Attorney, Solicitor for Petitioner.

The defendant required to file his answer or other defense in the above cause in the clerk's office of this court on or before the twentieth day after service hereof, excluding the day of said service, otherwise bill aforesaid may be taken pro confesso.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk.

7 Form No. 302.

I hereby certify, that on the 14 day of June, 1922, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendant, American Tobacco Company, Inc., by exhibiting to Geo. W. Hill as vice president of said

company at No. 111–5 Ave., N. Y. C., the within original, and at the same time leaving with him a copy thereof and at the same time and place leaving with him a copy of petition and order with notice of filing.

WM. E. HECHT,
United States Marshal,
Southern District of New York.

Dated June 14, 1922.

8-10 *Alternative writ of mandamus.*

In the District Court of the United States for the Southern District of New York.

No. E24/63. June Term, 1922.

[Title omitted.]

Whereas it appears from the petition of the Attorney General of the United States, filed at the request of the Federal Trade Commission of the United States, that the said Federal Trade Commission has instituted an investigation of the tobacco industry in the United States pursuant to the power and authority granted to, invested in, and conferred upon said Federal Trade Commission by the act of Congress entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914 (38 Stat. 717).

That the American Tobacco Company, Incorporated, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and that it has an office for the conduct of its business located in the city of New York, in the Borough of Manhattan, State of New York, at premises known as 111 Fifth Avenue, being within the Southern District of New York, and has
11 in its custody and control or in the custody and control of its officers, agents or employees, all of the books, accounts, records, documents, memoranda, contracts, papers and correspondence of said corporation.

That at the several and various times as set forth in the petition the said Federal Trade Commission, pursuant to its power and authority and for the purpose of enabling it to perform the duties imposed upon it by the act of Congress aforesaid, duly appointed and authorized as its agent and examiner James A. Horton and authorized him upon its behalf to inspect and examine the accounts, books, records, documents, memoranda, contracts, papers, and correspondence of the said defendant, American Tobacco Company, Incorporated, and the said duly authorized agent and examiner, while so authorized, applied to and made demand upon said defendant for permission to examine the said accounts, books, records, documents, memoranda, contracts, papers, and correspondence of the said corporation and the said defendant then and there having

the same in its custody and control, failed, neglected, and refused to permit the said commission, by its duly authorized agent and examiner, to have access to, or to examine the said accounts, books, records, documents, memoranda, contracts, papers, and correspondence.

Whereas it has been ordered by Honorable John C. Knox, District Judge of the Southern District of New York, that an alternative writ of mandamus issue as prayed. You are therefore commanded, unless said accounts, books, records, documents, memoranda, contracts, papers, and correspondence are immediately submitted to the duly authorized agent and examiner of the Federal Trade
12 Commission for inspection and examination and for the purposes of making copies thereof, as prayed, that you appear before the United States District Court for the Southern District of New York on the 23rd day of June, 1922, to show cause, if any there be, why the peremptory writ of mandamus as prayed should not be granted. Herein fail not.

Witness the Honorable Learned Hand, Judge of the United States District Court of the Southern District of New York.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk of the United States District Court of the Southern District of New York.

This 14th day of June, 1922.

Order granting alternative writ of mandamus.

In the District Court of the United States for the Southern District of New York.

No. E24/63. June Term, 1922.

[Title omitted.]

Upon motion of the United States attorney for the
13 Southern District of New York upon the verified petition herein filed this day praying for a writ of mandamus to issue against the American Tobacco Company, Incorporated, requiring them to permit the Federal Trade Commission by its authorized agents and examiners to have access to the accounts, books, records, documents, memoranda, contracts, papers, and correspondence of said defendant and on the affidavits of James A. Horton and J. P. Yoder, verified the 31st day of May, 1922, it is

Ordered, that the clerk of this court issue an alternative writ of mandamus commanding the defendant American Tobacco Company, Inc., unless the accounts, books, records, documents, memoranda, papers, and correspondence of the said defendant are immediately submitted to the duly authorized agent and examiner of the Federal Trade Commission for inspection and examination and for the purpose of making copies thereof as prayed, that the said defendant, American Tobacco Company, Inc., appear before the United States

District Court for the Southern District of New York on the 23d day of June, 1922, to show cause, if any there be, why a peremptory writ of mandamus as prayed should not be granted.

This 13th day of June, 1922.

JNO. C. KNOX.
U. S. D. J.

14 *Petition for writ of mandamus order.*

In the District Court of the United States for the Southern District of New York.

No. E24/63. June Term, 1922.

[Title omitted.]

To the honorable the judges of the District Court of the United States for the Southern District of New York:

The Federal Trade Commission, by William Hayward, United States attorney in and for the Southern District of New York, acting under the direction and by the authority of the Attorney General of the United States, at the request of the Federal Trade Commission files this petition and application for a writ of mandamus, and complaining of the respondent, American Tobacco Company, Incorporated, respectfully shows, and upon information and belief alleges:

1. That petitioner, the Federal Trade Commission, is a body corporate, or tribunal, created, organized, and existing under and by virtue of an act of Congress entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for
15 other purposes," approved September 26, 1914, which act is hereinafter referred to as the "Federal trade act."

2. The respondent, American Tobacco Company, Incorporated, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

3. That said respondent is engaged in the business of the manufacture and sale of tobacco and tobacco products in the southern district of New York.

4. That said respondent in the manufacture and sale of tobacco and tobacco products aforesaid is engaged in interstate commerce, and is engaged in doing business among the several States and Territories of the United States, and also with foreign countries.

5. That said respondent in the conduct of its business as aforesaid has, keeps, and maintains an office at premises known as 111 Fifth Avenue, in the Borough of Manhattan, city, county, and State of New York.

6. That said respondent at its office, referred to in paragraph 5 hereof, keeps and has in the custody and control of its officers, agents, or employees, certain books, documents, papers, writings, correspondence, and other documentary data relating to and bearing upon its said business in interstate commerce.

7. That the Federal trade act aforesaid approved September 26, 1914, among other things, gives to petitioner the power, and places upon it, the Federal Trade Commission, a duty, to gather and compile information concerning, and to investigate from time to time, the organization, business, conduct, practice, and management of any corporation engaged in interstate commerce, and also as to the relation of the corporation being so investigated to other corporations, associations, and partnerships, as is specifically set forth in section 6, subdivision (a) thereof.

8. That said Federal trade act, among other things, give to the petitioner the power, and places upon it a duty, as is set forth in section 6, subdivision (d) of the act aforesaid, upon the direction or request of either House of Congress, to investigate, and report the facts developed or ascertained upon such investigation, relating to any alleged violation of the antitrust acts by any corporation engaged in interstate commerce.

9. That on or about September 16, 1921, there was filed with the Federal Trade Commission, in the office of the secretary thereof a complaint against the respondent, the American Tobacco Company, Incorporated.

10. That said complaint alleged that said respondent in the conduct of its business in interstate commerce was indulging in practices which were in violation of certain provisions of the several acts of Congress, or certain of them, among which is the act of Congress approved September 26, 1914 (38 Stat. 717), in that the respondent was using certain methods of business practices resulting in unfair competition, in that it was regulating and fixing, or attempting to regulate and fix, the prices at which the commodities sold by it should be resold by those to whom it had sold them, and was cooperating, aiding, and abetting others to successfully
17 formulate and carry out a scheme or combination pursuant to which the resale prices of respondent's commodities should be fixed and maintained by those to whom respondent had previously sold its products or commodities.

11. That on August 9, 1921, the Senate of the Congress of the United States by its resolution No. 129, duly adopted, directed: "* * * the Federal Trade Commission * * * to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference as to market price to producers of tobacco, and the market price for manufactured tobacco and the price of leaf tobacco exported, and to report to the Senate as soon as possible the result of such investigation."

A copy of said resolution in full is annexed hereto and marked "Exhibit A."

12. That petitioner being informed as hereinbefore set forth, in order that it might be determined whether there was reason to believe that an unfair method of competition had been or was then being used, and in order that it might inform the Senate of the United States as by it requested, acting upon its own motion and

under and pursuant to the authority conferred upon it by section 6 of its constituent act, did formally determine to gather and compile information concerning, and to investigate the organization, business, conduct, practices, and management of the respondent, American Tobacco Company, Incorporated, and to investigate and determine the facts of the relation of said respondent to other corporations, individuals, associations, and partnerships.

Copy of the resolution adopted by the commission, dated October 14, 1921, is annexed hereto and marked "Exhibit B."

13. That petitioner pursuant to its determination, aforesaid, as set forth in paragraph 12 hereof, did, by its duly accredited, authorized, and appointed agents or representatives, actually embark upon such investigation and did gather and compile certain information relating to the conduct of respondent's interstate commerce business.

14. That at various times from September 29, 1921, to November 5, 1921, certain duly authorized and accredited agents or representatives of petitioner, at reasonable times did, on behalf of the Federal Trade Commission, demand of the respondent that it produce and furnish to them at respondent's office or place of business, 111 Fifth Avenue, in the city of New York, N. Y., certain specified documentary evidence, or written data, correspondence, and other paper writings, which were then and there in the possession, custody, or control of respondent, that copies thereof, or of parts thereof, might be made.

15. That respondent, complying with said demand and pursuant to its duty under the provisions of the Federal trade act, so to do, did produce for the perusal, inspection, and examination of petitioner's representatives, and for making copies thereof, certain of the data demanded.

16. That respondent, in violation of its duty so to do, and in violation of the provisions of the Federal trade act, aforesaid, did refuse to produce for the inspection, examination, and perusal of petitioner's said duly authorized agents or representatives certain documentary evidence, records, correspondence, and writings herein specified which were then and there in respondent's possession, custody, and control, and did refuse to permit copies thereof to be made by petitioner.

17. That the documentary evidence, records, correspondence, or writings which respondent refused to produce as demanded, as is set forth in paragraph 16 hereof, related to respondent's business in interstate commerce.

18. That thereafter petitioner, the Federal Trade Commission, by demand in writing dated October 17, 1921, and served upon the respondent on October 18, 1921, did again demand of respondent that it be permitted access to said records.

Copy of said written demand is annexed hereto, marked "Exhibit C."

19. That respondent refused to comply with the demand of petitioner and did refuse to permit petitioner or its duly authorized agents, and accredited representatives access to the data, and refused to produce the records demanded and refused to permit copies thereof to be made.

20. That the records, correspondence, and written data so refused all related to respondent's business in interstate commerce.

21. That under date of October 21, 1921, respondent addressed a communication in writing to petitioner, definitely refusing to comply with the demand of petitioner.

Copy annexed and marked "Exhibit D."

20 22. Petitioner, under date of October 26, 1921, in a communication in writing, addressed to respondent, again demanded that said records be produced for inspection by petitioner's duly authorized agents or representatives, and that copies thereof might be made.

Copy of said communication is annexed hereto, marked "Exhibit E."

23. That by writing dated March 3, 1922, petitioner again demanded of respondent that the records, correspondence, paper writings, and documents therein described be produced for inspection by its duly authorized agents and accredited representatives.

A copy of said demand is annexed, marked "Exhibit F."

24. The demand referred to in paragraph 23 hereof was duly presented to respondent at its office, 111 Fifth Avenue, Borough of Manhattan, New York City, by James A. Horton, a duly authorized agent or representative of petitioner, during the usual business hours, on March 8, 1922.

25. Respondent at the time said demand in writing was served by said James A. Horton, refused to comply therewith, and refused to permit said James A. Horton, a duly authorized agent of petitioner, to have access to the records, correspondence, paper writings, and data described therein, and refused to produce the same for the inspection of said James A. Horton, that copies thereof might be made.

26. By letter dated March 31, 1922, a copy of which is annexed hereto, marked "Exhibit G," respondent by its counsel reiterates its refusal.

21 27. Respondent has refused and still continues to refuse to permit the petitioner or any of its duly authorized agents or representatives to have access, at reasonable times, and at any time whatsoever, to the records specified in "Exhibit F," or to make copies thereof.

28. That petitioner, under date of January 17, 1922, made and transmitted to the Senate of the Congress of the United States, a preliminary report in writing setting forth the facts developed by petitioner's investigation, in so far as it was able to prosecute same, up to that time, as was requested of it by resolution No. 129, 67th Congress, adopted August 9, 1921.

29. That said report referred to in paragraph 28 hereof, on January 18, 1922, was by the Senate referred to the Committee on Agriculture and Forestry, and on January 25, 1922, was duly ordered to be printed as a public document.

30. That thereafter the report referred to in paraghaphs 28 and 29 hereof was duly printed as, and is, Senate Document 121, 67th Congress, 2d session, and reference thereto is hereby made to it as such.

31. That said report is preliminary and does not purport to set forth all of the facts relating to the subject matter therein discussed.

32. That respondent's acts in refusing to comply with the provisions of the Federal trade act aforesaid as herein set forth, and in refusing to produce for the inspection of petitioner, or its duly authorized agents, its records, and in refusing to permit
22 petitioner to make copies thereof, precluded, and has prevented petitioner up to the present time from making a report to the Senate embodying a full and complete statement of the facts relating to the subject matter involved in said Senate Resolution No. 129 aforesaid.

33. Respondent's acts as herein set forth have also prevented petitioner from prosecuting its duty and hindered it in the exercise of its power, given to it by said Federal trade act, and thereby precluded peitioner from compiling information, and investigating the organization, business, conduct, practices, and management of respondent and its relation to other corporations and to individuals, associations, and partnerships.

34. That respondent by its said acts hinders and prevents petitioner from exercis'ng its power, in the performance of its duty, to prevent persons, partnerships, or corporations from using unfair methods of competition in interstate commerce.

35. That the said acts by the respondent herein complained of have continued during all of the times herein mentioned and continue to the present time.

36. That it is necessary and essential that petitioner have access to the records, papers, correspondence herein specifically set forth, and the right to examine the same, and to make copies thereof, that it may properly exercise its power and perform the full duty placed upon and delegated to it by the act approved September 26, 1914, aforesaid.

37. That petitioner has no other adequate remedy by which
23 defendant may be required to comply with the provisions of the Federal trade act, and with the demand or order of the Federal Trade Commission made in the proper exercise of its power thereunder and pursuant to the provisions thereof.

38. That on or about May 31, 1922, there was issued and served upon the respondent and others, a complaint by the Federal Trade Commission alleging violation of the provisions of section 5 of "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, with

respect to the respondent's business in interstate commerce in so far as it related to the other parties named in said proceeding as set forth in copy of said complaint annexed hereto and marked "Exhibit H."

39. That no other application has been made for the relief herein prayed.

Wherefore, petitioner prays that this honorable court will grant unto it due process of subpœna directed to said respondent, commanding said respondent to appear herein and to answer, but not under oath, answer under oath being hereby expressly waived, and to abide and perform such directions and decrees as may be made in the premises; that an alternative writ of mandamus forthwith issue, commanding the respondent unless the accounts, books, records, documents, memoranda, contracts, papers, and correspondence of the respondent are immediately submitted to the duly authorized agent or examiner of the Federal Trade Commission for inspection and examination and for the purpose of making copies thereof, that respondent show cause before the United States
24 District Court for the District of New York on a day to be fixed by the court why a peremptory writ of mandamus should not issue, directed to the said respondent, commanding the respondent to forthwith deliver into the possession of the Federal Trade Commission or its duly authorized agent, at the office of the said corporation, 111 Fifth Avenue, in the city of New York, during the usual business hours of any business day and at such times as the duly authorized agent shall request, for examination and inspection, and for the purpose of copying same, or such portions thereof as may be desired, the following:

All letters and telegrams received by the American Tobacco Company from all of its jobber customers located at different points throughout the United States, and also copies of all letters and telegrams sent by the American Tobacco Company to such jobbers during the period January 1, 1921, to December 31, 1921, inclusive.

And also commanding it, the respondent, to, in all respects, conform to the provisions of the Federal trade act, and to do and perform all of the said acts, and things in the premises, as the law requires, and for such other and further relief as to the Court may seem good and proper.

HARRY M. DAUGHERTY,
Attorney General of the United States.
WILLIAM HAYWARD,
United States Attorney of the Southern District of New York.

CITY OF WASHINGTON,
District of Columbia, ss:

J. P. Yoder, being duly sworn, says:

25 That he is the secretary of the Federal Trade Commission, petitioner in the above-entitled proceeding; that he has read the foregoing petition; that the facts stated therein are true of his

own knowledge except as to those matters stated therein to be alleged upon information and belief, and as to those he believes them to be true; that the sources of deponent's information and the grounds of his belief are: books, papers, documents, and records of petitioner in his possession as secretary of petitioner, statements made to him by members of the commission, by its agents and employees.

J. P. YODER.

Subscribed and sworn to before me this 31st day of May, 1922.
My commission expires April 5, 1923.
[SEAL] WARREN R. CHOATE,
Notary Public.

Exhibit A to petition.

S. Res. 129.

In the Senate of the United States.

AUGUST 9, 1921.

Resolved, that the Federal Trade Commission be, and is hereby, directed to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference as to market price to producers for tobacco and the market price
26 for manufactured tobacco and the price of leaf tobacco exported, and report to the Senate as soon as possible the result of such investigation.

Attest:

(Sgd.) GEORGE A. SANDERSON,
Secretary.

Exhibit B to petition.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on this 14th day of October, A. D. 1921.

Present: Huston Thompson, Chairman; Nelson B. Gaskill, Victor Murdock, John F. Nugent, Commissioners.

FEDERAL TRADE COMMISSION
v.
AMERICAN TOBACCO COMPANY.

Resolution.

Whereas the Federal Trade Commission was directed by Senate Resolution No. 129, 67th Congress, to investigate the tobacco situa-

tion in the United States, as to the domestic and export trade, with particular reference to the market price to producers of to-
27 bacco and the market price for manufactured tobacco and the price of leaf tobacco exported, and report to the Senate the result of such investigation; and

Whereas, on application duly made to the Federal Trade Commission, the commission docketed for investigation, on August 27th, 1921, an application for the issuance of a complaint against the American Tobacco Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, said application being designated and known as the Federal Trade Commission File 1-2501; and it appearing to said commission that said American Tobacco Company is engaged in the business of manufacturing and selling tobacco products and causing such products to be transported to the purchasers thereof, from the State of New York and from other States wherein it maintains branch establishments, through and into other States of the United States and into foreign countries, and it further appearing from said application that said American Tobacco Company in the course of its said business is charged with engaging in an unfair method of competition in violation of section 5 of the Federal Trade Commission act; and

Whereas the Federal Trade Commission deems it necessary to gather and compile information concerning and to investigate the organization, business, conduct, practices, and management of said American Tobacco Company: Now, therefore, be it

Resolved, that the Federal Trade Commission conduct an investigation under authority of section 5 and section 6, paragraph (a), of the act of Congress approved September 26, 1914, entitled
28 "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and in pursuance of said Senate Resolution No. 129, 67th Congress, and said application File No. 1-2501, and for the further purpose of gathering and compiling information concerning the organization, business, conduct, practices, and management of said American Tobacco Company, Inc.; and be it further

Resolved, that James A. Horton, an attorney, examiner of this commission, be, and he is hereby, designated as the duly authorized agent of the commission, to demand and have access to, for the purpose of examination, and the right to copy any and all documentary evidence in the possession or control of said American Tobacco Company which may relate to or have any bearing upon any matters within the scope of the investigation hereby authorized.

Adopted by the commission.

[SEAL.] (Sgd.) J. P. YODER,
Secretary.

Exhibit C to petition.

UNITED STATES OF AMERICA,
Before Federal Trade Commission:

NOTICE AND DEMAND.

To the American Tobacco Company, New York City, N. Y.:

Please take notice that pursuant to the provisions of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties and for other purposes," section 9 of said act reads as follows:

Section 9. That for the purpose of this act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against * * *

and pursuant to Senate Resolution No. 129 of the 67th Congress, adopted August 9, 1921, in words as follows:

Resolved, that the Federal Trade Commission be, and is hereby, directed to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference as to market price to producers of tobacco and the market price for manufactured tobacco and price of leaf tobacco exported, and report to the Senate as soon as possible the result of such investigation.

the Federal Trade Commission reports itself, by its duly authorized agents, for the purpose of inspecting, examining, and taking copies of, if deemed advisable, of any and all documentary evidence, including documents, papers, and correspondence in its possession or control of the American Tobacco Company, said company being a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and being engaged in the manufacture of tobacco products, which it sells and transports or causes to be sold and transported in interstate commerce, for the further purpose of informing the Federal Trade Commission with respect to the above entitled investigation and with respect to a certain application hereinbefore made to the commission for the issuance of a complaint against said American Tobacco Company, which application is designated and known as Federal Trade Commission's File No. 1-2501, it appearing from said application that the American Tobacco Company is charged with engaging in an unfair method of competition in violation of section 5 of the Federal Trade Commission act; and for the further purposes of gathering and compiling information concerning the organization, business, conduct, practices, and management of said American Tobacco Company, in pursuance of the authority granted said Federal Trade Commission under section 6, paragraph (a), of the Federal Trade

Commission act. And to that end the Federal Trade Commission hereby formally demands an opportunity to examine all documentary evidence, including all documents, papers, and correspondence in your custody or under your control, in order that copies may be made of such portions of said documentary evidence as may be deemed relevant.

In witness whereof the Federal Trade Commission has caused this notice to be issued, signed by its secretary, and its official seal to be thereto affixed, this 17th day of October, 1921.

By the commission:

[SEAL.] (Signed) J. P. YODER,
Secretary.

copy/fh
JAH–o–5–27–22

31 I hereby certify that a duplicate original of the within notice and demand was duly served in person on Percival S. Hill, president of the American Tobacco Company, on the 18th day of October, 1921.

(Signed) JAS. A. HORTON,
Attorney and Examiner.

Copy/fh
JAH–o–5–27–22

Exhibit D to petition.

(Indian vignette. Cable address: Powhattan. Home office: Jersey City, N. J. Law department, Junius Parker, counsel. Jonathan H. Holmes, assistant counsel.)

THE AMERICAN TOBACCO COMPANY, INCORPORATED,
111 Fifth Avenue, New York, October 21, 1921.

FEDERAL TRADE COMMISSION,
Washington, D. C.

GENTLEMEN: The American Tobacco Company received at the hands of Mr. James A. Horton, attorney and examiner of the Federal Trade Commission, a paper writing signed by Mr. Yoder, your secretary, under the seal of the commission, dated October 17, called a "Notice and demand." This paper was referred to me as counsel for the company, and I have conferred with the officers of the company, and this letter may be taken as the answer of the company to that "Notice and demand."

32 It has always been and is now the policy and desire of the officers of the American Tobacco Company to cooperate with the Federal Trade Commission, recognizing that the Federal Trade Commission is, or should be, a constructive agency in the development of commerce and in removing, instead of merely punishing, the evils that are liable to enter into trade. It has never been our policy, and is

not now our desire, to enter into the serious questions that might be raised as to the powers of the commission to enforce its demand for information, or for the examination of books and papers.

As known to us heretofore and as confirmed by the "Notice and demand" served on us, there are two phases of the examination that is now in progress: The Senate resolution of August 9, 1921, calls for an investigation of the tobacco situation in the United States as to the domestic and export trade, with particular reference to market price to producers for tobacco and the market price for manufactured tobacco and price of leaf tobacco exported. We have understood that the representatives of the Federal Trade Commission who have been in our offices for several weeks investigating as to prices paid by us for leaf tobacco, costs of manufacture, and other such things, have been making their investigation in order to comply with this resolution; I think these investigators will tell you that they have had all facilities given them for such investigation.

The second phase involved in your investigation has to do with a circular letter issued by the American Tobacco Company to its customers in June, 1921, copy of which circular you have, and which circular frankly sought, in what was thought an entirely
33 proper and legal way, to prevent or minimize the obvious injury to our brands and business attendant upon unreasonable price cutting by our customers. I do not understand this has to do at all with the Senate resolution aforesaid. I do understand, both otherwise and from your "Notice and demand," that some customer of ours, most likely a customer to whom we have refused to sell our product, has complained that such refusal has been because he has persisted in cutting our price, and that our conduct therefore has been in some way an "unfair method of competition." Before the receipt of your "Notice and demand" I had conferred with representatives of the Federal Trade Commission and attempted to explain to them thoroughly our position; you have already an admitted copy of our circular of June, 1921; we are willing to turn over to you absolutely all correspondence between the New York office and the salesmen of the company having to do with this situation or otherwise. We are entirely willing to turn over to you all correspondence between us and any jobber whom we ultimately refused to sell or to whose conduct in cutting prices we objected.

Following our circular of June, 1921, though, we received a great many letters from jobbers, our customers, and while I have not examined those letters and cannot say that a single one of them indicated improper or unlawful conduct on the part of any of the jobbers, our customers, I am yet sure that these letters were written freely, frankly, and confidentially, without thought that they would ever be turned over to governmental authorities or any one else. I emphasize the fact again that I do not know the contents of these

letters, but it would surprise me if letters were not written complaining bitterly and perhaps inaccurately of some local
34 price cutter which, in the opinion of the jobbers writing, would make it impossible for other jobbers to make even a living profit in the locality affected; it may be also the jobbers have written us of their own activities to secure by cooperation a living profit.

The officers of the company and I do not believe that we should be asked to turn over these letters. I assume that if a complaint is made we may be required by subpœna duces tecum to produce letters relevant to such complaint, even though such involve activities of others; but I do not believe that it is sufficiently clear that you have a right under present circumstances and conditions to demand such letters as to warrant the company in complying with your "Notice and demand," when such might not only forfeit the valuable good will that we enjoy with our jobbers, but subject us to the just criticism of disclosing confidential letters when there is no legal necessity for our doing so.

With the exception aforesaid, and without reference to what our legal rights in the premises may be, your representatives are at full liberty to examine every book and paper in the possession of the American Tobacco Company, and we will be glad to facilitate such examination. This, as you will observe, includes every phase of our activities that can have any relevancy to the Senate resolution aforesaid, and every phase of our own activities or so far as concerns us and criticism that might be made of us, relative to the so-called price maintenance.

I am directed by the officers of the company to assure you again of our desire to cooperate with you, and to say to you in all frankness and in all earnestness that we believe constructive results can best be obtained by a continuance of the policy of reasonable
35 consideration and cordial cooperation between your commission and a company such as ours, which is the object of investigation.

Very truly, yours,

(Sgd.) J. PARKER.

Exhibit E to petition.

OCTOBER 26, 1921.

MY DEAR MR. PARKER: Your letter of October 21st, in response to the formal demand of the commission that its representatives be permitted to examine the correspondence, files, records, etc., of the American Tobacco Company, has been received and considered by the commission.

It is noted that you are willing that the representatives of the commission examine all books and papers in the possession of the company with the exception of letters from your jobbing customers

who may have complained to your company regarding the price-cutting activities of another jobber, or who may have written relative to their own activities in maintaining prices.

In so far as your attitude makes it possible for our examiners to proceed, instructions have been issued to them to advance their examination as far as possible, reserving all right to the commission to insist upon compliance with its formal demand to which your letter refers.

In this connection we desire to call your attention in particular to the double powers contained in the first paragraph of section 9 of the Trade Commission act, which reads in its essential part as follows:

36 "That for the purposes of this act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. * * *"

The commission understands this paragraph to mean that the commission has an unlimited right of access to the books and records of a corporation under investigation or being proceeded against, at all reasonable hours and to make copies therefrom. It also has the power to require the attendance of witnesses and the production of documentary evidence by subpœna. But the exercise of the right of access, examination, and copying is not dependent upon the prior issue of subpœna. This is clearly shown by the double grant of power of enforcement. A demand for access and examination is enforcible under the fourth paragraph of the section by action through the Attorney General for writ of mandamus. Refusal to comply with a subpœna is under the second and third paragraph of the section dealt with by contempt proceedings in the United States district courts. Manifestly, if the issue of a subpœna were a prerequisite in all cases to access and examination, there would have been no need for the provision of an enforcement by mandamus.

We call your attention to the fact that the preliminary investigation now being made is directly pursuant to the instructions of a resolution by the United States Senate, that the actions of the
37 commission under section 5 are supplementary thereto, and that the commission is proceeding on this preliminary examination under the first power conferred by the first paragraph of section 9 referred to above. In view of these conditions the commission insists that its representatives be given full and complete access to any and all documentary evidence in the possession or control of the American Tobacco Company. The fact that our representatives have been instructed to proceed to the extent that you have expressed your willingness to cooperate is not to be construed

in any sense as a waiver of the demand which has been served upon you. It is merely a step to expedite the completion of the matter in hand.

We cannot accept the contentions of the American Tobacco Company as set forth in your letter of October 21, nor permit the examination which has been instituted, to be limited in the manner which you have suggested. We find no suggestion of such limitations in the statutory statement of the powers conferred upon the commission, or the duties devolving upon it thereunder.

We trust that a reconsideration of the matter in the light of this letter will result in a withdrawal by you of the restrictions which you have placed upon the actions of this commission through its representatives.

Cordially, yours,

Chairman.

JUNIUS PARKER, Esq., Counsel,
The American Tobacco Company,
111 Fifth Avenue, New York City.

38 *Exhibit F to petition.*

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

NOTICE AND DEMAND.

To: The American Tobacco Company, 111 Fifth Avenue, New York City.

Please take notice that the Federal Trade Commission under authority of the act of Congress approved September 26, 1914, entitled, "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," section 9 of said act of Congress reading as follows:

"That for the purpose of this act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination and the right to copy any documentary evidence of any corporation being investigated or proceeded against; * * *

for the purpose of gathering and compiling information concerning the organization, business, conduct, practices and management of the American Tobacco Company, in pursuance of authority granted the Federal Trade Commission under section 6 (a) of the said act of Congress approved September 26, 1914, and also for the further purpose of informing the Federal Trade Commission with respect to a certain application heretofore made to the commission for issuance of a complaint against the American Tobacco

39 Company which application is designated and known as Federal Trade Commission's File 1-2501—it appearing from said

application that the American Tobacco Company is charged with engaging in unfair methods of competition in violation of section 5 of the said act of Congress approved September 26, 1914, and

Further take notice that the commission in response to United States Senate Resolution No. 129, 67th Congress, adopted August 9, 1921, in words as follows:

"Resolved that the Federal Trade Commission be, and is hereby, directed to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference as to market price to producers of tobacco and the market price for manufactured tobacco and price of leaf tobacco exported and report to the Senate as soon as possible the result of such investigation;"

under authority of said act of Congress approved September 26, 1914, particularly section 9 of said act of Congress as hereinbefore set forth, and section 6 (d) in words as follows:

"Upon the direction of the President of either House of Congress to investigate and report the facts relating to any alleged violation of the antitrust acts by any corporation."

presents itself by its duly authorized agent, James A. Horton, to the said American Tobacco Company, a corporation with principal office and place of business at No. 111 Fifth Avenue, New York City, and being engaged in the manufacture of tobacco products which it sells and transports, or causes to be transported and sold, in inter-
40 state commerce, for the purpose of inspecting, examining, and making copies of the following documentary evidence in the possession or control of the said the American Tobacco Company:

All letters and telegrams received by the American Tobacco Company from all of its jobber customers located at different points throughout the United States, and also copies of all letters and telegrams sent by the American Tobacco Company to such jobbers during the period of January 1, 1921, to December 31, 1921, inclusive.

And to that end the Federal Trade Commission hereby formally demands an opportunity to examine and make copies of any or all of the aforesaid correspondence, documents, or papers specifically referred to in the custody or under the control of said the American Tobacco Company, in order to obtain information relevant to the aforesaid investigation of the Federal Trade Commission under authority of the said act of Congress approved September 26, 1914.

In witness whereof, the Federal Trade Commission has caused this notice to be issued, signed by its secretary, and its official seal to be thereto affixed, this the 3rd day of March, 1922.

By the commission:

[SEAL.] (Signed) J. P. YODER,
J. P. YODER,
Secretary.

I hereby certify that a duplicate original of the within notice and demand was duly served upon Chas. F. Neiley, secretary of the American Tobacco Company, on the 8th day of March, 1922, and

that the said Chas. F. Neilley did then and there refuse to af-
41 ford the undersigned access to the documentary evidence described in the notice and demand herein.

(Signed) JAMES A. HORTON,
Agent of the Federal Trade Commission.

Exhibit G to petition.

(European associate, Henry French Hollis, 8 Rue St. Florentin, Paris.)

JOHN WALSH,
COUNSELLOR AT LAW,
Southern Building, Washington, D. C., March 31, 1922.

Telephone, Main 4844.

FEDERAL TRADE COMMISSION,
Washington, D. C.

GENTLEMEN: Replying to your notice and demand on the American Tobacco Company dated March 3, 1922, you are advised that I am directed by said company to say that the American Tobacco Company declines to comply with the demand of the Federal Trade Commission except as set forth in a letter from that company to the Federal Srade Commission, dated October 21, 1921.

Yours very truly,

(Sgd.) JOHN WALSH.

42 *Exhibit H to petition.*

UNITED STATES OF AMERICA,
Before Federal Trade Commission:

Docket No. 886.

In the matter of Wholesale Tobacco and Cigar Dealers' Association of Philadelphia, Pennsylvania, its officers, directors, and members: Nelson F. Eberbach, its president; Harvey D. Narrigan and James Murphy, its vice presidents; Herman J. Krull, its treasurer; Paul L. Brogan, its secretary, and their successors: Arthur Shipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd, and Morris Hochman, and their successors, directors of said association and together constituting its board of directors: Nelson F. Eberbach, John S. Eberbach, and Joseph H. Eberbach, partners, doing business under the name and style A. B. Cunningham & Company; Dusel, Goodloe & Company, Incorporated, a corporation; Philip Godeski and Sidney G. Godeski, partners, doing business under the name and style Franklin Tobacco Company; Frank Kuhn, George Kuhn, and John Kuhn, partners, doing business under the name and style F. Kuhn & Brother; Peter J. Murphy and John

Murphy, partners, doing business under the name and style Peter F. Murphy Company; Charles A. Krull and Herman Krull, partners, doing business under the name and style Charles A Krull; Baum & Neely, Incorporated, a corporation; William F. Shep-
43 herd and John G. Shepherd, partners, doing business under the name and style S. Shepherd's Sons; T. H. Hart and A. I. Mitchell, partners, doing business under the name and style T. H. Hart & Company; F. Hartmann & Son, a corporation; Yahn & McDonnell Company, a corporation; M. Blumenthal; John Wagner and Joseph W. Wagner, partners, doing business under the name and style of John Wagner & Sons; Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company; Victor Fermani; Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold; Frank Blatt; Arthur Shipton and Thomas F. Cooper, partners, doing business under the name and style Shipton & Payne Company; H. S. Moorhead, an individual doing business under the trade name Duncan & Moorhead; Bennett Hollard; P. Hochman; M. J. Dalton Company, a corporation; Brucker & Boghien, Incorporated, a corporation; Fred G. H. Woerner, an individual doing business under the trade name Fred G. H. Woerner & Sons; S. T. Banham and A. L. Banham, partners, doing business under the name and style S. T. Banham & Brothers; E. Cohen and William Cohen, partners, doing business under the name and style E. Cohen & Sons; John Murphy and James Murphy, partners, doing business under the name and style Murphy Brothers; American Tobacco Company, a corporation; P. Lorillard Company, a corporation.

COMPLAINT.

Acting in the public interest pursuant to the provisions
44 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that the Wholesale Tobacco and Cigar Dealers Association of Philadelphia, Pennsylvania, its officers, directors, members, and the various individuals, partnerships, and corporations named in the caption hereof, hereinafter referred to as respondents, have been and are using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of said act, and states its charges in that respect as follows:

Paragraph 1.—Respondent, Wholesale Tobacco and Cigar Dealers Association of Philadelphia, Pennsylvania, is a voluntary unincorporated association organized in the year 1920 by and composed of various individuals, partnerships, and corporations engaged in the business of selling at wholesale to wholesale and retail dealers cigars, cigarettes, and other tobacco products in the State of Pennsylvania and in neighboring States, in some instances doing a retail business in said commodities in addition to said whole-

sale business; said association is hereinafter called the association. Respondents, Nelson F. Eberbach, Harvey D. Narrigan, James Murphy, Herman Krull, and Paul L. Brogan were the original officers of the association, holding the respective official positions set out in the caption hereof. They and their successors have continuously been and are now such officers administering the affairs of the association. Arthur Shipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd, and Morris Hochman were
45 the original directors of the association and together constituted the original board of directors. They and their successors have continuously been and still are the directors and board of directors of the association, controlling and directing its affairs.

GROUP 1.

The following-named respondents with their several principal places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in selling one or more of the aforesaid tobacco products at wholesale to wholesale and retail dealers in several States of the United States. They cause said products when so sold to be transported from their respective places of business in said city of Philadelphia to said purchasers at various points in various States of the United States:

Nelson F. Eberbach, John S. Eberbach, and Joseph H. Eberbach, partners doing business under the name and style of A. B. Cunningham & Company;

Dusel, Goodloe & Company, Incorporated, a corporation organized under the laws of the State of New Jersey;

Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Company;

Peter J. Murphy and John Murphy, partners doing business under the name and style Peter F. Murphy Company;

Charles A. Krull and Herman Krull, partners doing business under the name and style Charles A. Krull;

46 William D. Shepherd and John G. Shepherd, partners doing business under the name and style of S. Shepherd's Sons;

T. H. Hart and A. I. Mitchell, partners doing business under the name and style T. H. Hart & Company;

Yahn & McDonnell Company, Incorporated, a corporation organized under the laws of the State of Pennsylvania;

M. Blumenthal;

John Wagner and Joseph W. Wagner, partners doing business under the name and style of John Wagner & Sons;

Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company;

Victor Fermani;

Bennett Hollard;

B. Hochman;

M. J. Dalton Company, a corporation organized under the laws of the State of Pennsylvania;

Brucker & Boghien, Incorporated, a corporation organized under the laws of the State of Pennsylvania;

S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers;

E. Cohen and William Cohen, partners doing business under the name and style E. Cohen & Sons.

GROUP II.

The following-named respondents, with their several places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in the
47 business of selling one or more of aforesaid tobacco products at wholesale to wholesale and retail dealers wholly within the State of Pennsylvania:

Frank Kuhn, George Kuhn, and John Kuhn, partners doing business under the name and style of F. Kuhn & Brothers;

Baum & Neely, Incorporated, a corporation organized under the laws of the State of Pennsylvania;

Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold;

Frank Blatt;

Arthur Shipton and Thomas F. Cooper, partners doing business under the name and style Shipton & Payne Company;

Anna E. Bechtold, an individual doing business under the trade name of Duncan & Moorhead;

Fred G. H. Woerner, an individual doing business under the trade name Fred G. H. Woerner & Sons.

GROUP III.

The following-named respondents with their several principal places of business in the city of Camden, State of New Jersey, were at all times hereinafter mentioned and still are engaged in selling one or more of aforesaid tobacco products at wholesale to wholesale and retail dealers in several States of the United States. They cause said products when so sold to be transported from their several places of business in said city of Camden, to said purchasers at points in various States of the United States:

F. Hartmann & Son, a corporation organized under the laws of the State of New Jersey;

48 John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers;

All the foregoing respondents whose names are set out in Groups I, II, and III above were at all times hereinafter mentioned and still are members of the association and are hereinafter collectively referred to as the members. In the absence of the acts and things

done by them as more particularly hereinafter set out, they were and are naturally and normally in unrestricted competition with each other and with other dealers in aforesaid territory.

Respondent, American Tobacco Company, is a corporation organized under the laws of the State of New Jersey, with its principal office in the city of Jersey City in said State and with factories in several of the United States. It was at all times hereinafter mentioned and still is engaged in the manufacture of cigars, cigarettes, and other tobacco products and the sale thereof to wholesale and retail dealers throughout the United States. It causes its products when so sold to be transported from the point of manufacture to said purchasers at points in other States of the United States. Amongst said purchasers are all the respondents set out in Groups I, II, and III above.

Respondent, P. Lorillard Company, is a corporation organized under the laws of the State of New Jersey, with its principal office in the city of Jersey City, in said State, and with factories in several of the United States. It was at all times hereinafter mentioned and still is engaged in the manufacture of cigars, cigarettes, and other tobacco products, and the sale thereof to wholesale and retail dealers throughout the United States. It causes its products when
49 so sold to be transported from the point of manufacture to said purchasers at points in other States of the United States. Amongst said purchasers are all the respondents set out in Groups I, II, and III above.

Said manufacturers at all times hereinafter mentioned were and still are in competition with each other and with other individuals, partnerships, and corporations similarly engaged in the manufacture and/or sale of tobacco products in interstate commerce except in so far as the same has been limited, prevented, or suppressed by the acts and things done by them and the other respondents herein as more particularly hereinafter set out.

Paragraph 2.—At the time of the organization of the association, the prices at which said manufacturers sold their products were fixed as follows: Said manufacturers severally supplied the members with a schedule of prices denominated "list prices" which were the prices severally suggested by said manufacturers at which their products should be resold by the members to the retail trade. The prices at which said products were sold to the members were fixed by certain uniform discounts off said list in each instance, whereby the members paid to said manufacturers for said products said list prices minus said discounts. Wholesale and retail dealers in tobacco products throughout the United States, including respondent dealers set out in Groups I, II, and III above, then were and still are dependent upon respondent manufacturers for their supply of a large portion of the products in which they deal. The extent of this dependence is such that when any such dealer is unable to secure the products of respondent manufacturers or either of them his business is sub-

50 stantially crippled, and he is placed at a competitive disadvantage with dealers supplied with said products. In the year 1920, the association and its members, acting through the association and cooperating and conspiring with it, and with each other, agreed upon a schedule of fixed prices at which the members should thereafter resell to their dealer-customers the products dealt in by the members, including the products of respondent manufacturers, and having thus fixed said uniform resale prices, adopted a system for the maintenance and enforcement of said resale prices by the members and by all other wholesale dealers in the trade who did business within the territory served by the members. Respondent manufacturers cooperated and conspired with the association and its members and participated in said price maintenance system as is more particularly hereinafter set out. In the course of aforesaid cooperative enforcement of said system, the members, and the association through its officers and directors, did, amongst others, and still do, the following acts and things:

(a) Undertook among themselves to maintain said resale prices, and did maintain same;

(b) Caused the fixation of said resale prices to appear as the formal action of the association by an appropriate resolution in that behalf;

(c) Caused the association to notify all members of said action;

(d) Sought by persuasion and intimidation to cause all dealers in the territory above referred to, including those members of the association who discontinued the maintenance of said resale prices in violation of their aforesaid undertakings so to do, to maintain said resale prices;

51 (e) Sought and secured the cooperation of respondent manufacturers in such persuasion and intimidation, which each said manufacturer rendered by notifying the trade in aforesaid territory, by circular letters and otherwise, that the notifier would refuse to furnish further supplies of his products to any wholesale dealer who failed to resell such products at the prices fixed in aforesaid schedule, or implying the same in veiled language;

(f) Caused reports of the names of said dealers who failed to maintain said resale prices to be reported by the members and their salesmen, either directly to the association or through the respective members in each instance to the association, and upon receiving such reports in turn reported the names of such offending dealers to respondent manufacturers, requesting the assistance and cooperation of respondent manufacturers in the enforcement of said system by having said manufacturers refuse to further supply said offending dealers with any of their products;

(g) As a result of reporting said names to the respondent manufacturers and requesting their cooperation, as set out in specification (f) hereof, secured the cooperation and assistance of said manufacturers in that behalf, and each said manufacturer upon receiving

such information proceeded to investigate said instances of price cutting, and upon finding that the offending dealer was cutting prices, and refusing and failing to maintain aforesaid resale prices, refused to furnish said offending dealer with further supplies
52 of its, the manufacturer's, products, until the offender gave such promises and assurances of maintaining said resale prices in the future as were satisfactory to said manufacturers and the association in that regard:

(h) Employed special agents to spy upon the members and other dealers in the aforesaid territory in order to ascertain if any of them were or was failing to maintain said resale prices, and upon discovering that a member or dealer was so doing, to report the name of such offender to the association. Upon receiving such reports, sought and secured the cooperation of the manufacturers with regard to said offenders in like manner and with like results, as set out in specifications (f) and (g).

Paragraph 3.—The aforesaid acts and things done by respondents and each of them had and still have the tendency and capacity to constrain all wholesale dealers doing business in the territory above mentioned to uniformly sell the aforesaid products to their dealer-customers at the prices fixed by the association and its members as hereinbefore set out, and hence to hinder and suppress all competition in the wholesaling of said products in said territory, particularly among the members of the association, and further to hinder and restrict competition between all retail dealers in said territory. Respondents' said practices thus tended and still tend to unduly hinder and obstruct the free and natural flow of commerce in the channels of interstate commerce.

Paragraph 4. The above acts and things done by respondents and by each of them constitute unfair methods of competition in
53 commerce, within the intent and meaning of section 5 of an act of Congress entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

Wherefore, the premises considered, the Federal Trade Commission, on this 29th day of May, A. D. 1922, now here issues this, its complaint against said respondents and each of them.

NOTICE.

Notice is hereby given you, Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, and you its officers, directors, and members named in the caption hereof, respondent herein, that the 18th day of July, A. D. 1922, at 10.30 o'clock in the forenoon, is hereby fixed as the time, and the offices of the Federal Trade Commission, in the city of Washington, D. C., as the place when and where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right, under said act, to

appear and show cause why an order should not be entered by said commission requiring you to cease and desist from the violation of the law charged in this complaint.

In witness whereof the Federal Trade Commission has caused this complaint to be signed by its secretary and its official seal to be hereto affixed at Washington, D. C., this 29th day of May, 1922.

By the commission:

[SEAL.] J. P. YODER,
Secretary.

54 In the District Court of the United States for the Southern District of New York.

Affidavit of James A. Horton.

[Title omitted.]

CITY OF WASHINGTON,
District of Columbia, ss:

James A. Horton, being duly sworn, says:

That he is, and at all of the times herein mentioned was, a duly authorized agent and accredited representative of the Federal Trade Commission.

That upon the dates herein set forth he, as such duly authorized agent of the Federal Trade Commission, did, at reasonable times and during the usual business hours, present himself in person at the premises known as 111 Fifth Avenue, Borough of Manhattan, city, county, and State of New York, at the office or place of business there maintained by American Tobacco Company, Incorporated, the defendant named in the above-entitled proceeding, and did then and there present his credentials as the duly authorized agent of the aforementioned Federal Trade Commission, and as such did
55 request and demand access to the books, papers, documents, memoranda, and correspondence as set forth in the written demand annexed and made a part of this affidavit, dated March 3, 1922.

That the demand made by deponent as herein set forth was made as aforesaid on March 8, 1922, and was made by deponent in person and by delivering a copy of the said written demand aforesaid to Charles F. Neilley, secretary of the American Tobacco Company, Incorporated, at the premises known as 111 Fifth Avenue, in the city of New York, and leaving the same with him.

That the defendant then and there refused to accede to or comply with the demands so made, and affirmatively and unequivocably refused to give deponent access to the records referred to, and refused to permit deponent to inspect or examine them or any part of them at that time or at any other time.

That previously, on or about October 17, 1921, and at a subsequent date, deponent, as aforesaid, made two separate demands upon the said American Tobacco Company, Incorporated, on behalf of the Federal Trade Commission that it permit him to inspect the records herein referred to and to make copies thereof, but on each and both occasions the demand so made was refused and the American Tobacco Company, Incorporated, refused and has continued, and up to the present time does refuse to permit such inspection.

JAMES A. HORTON.

Subscribed and sworn to before me this 31st day of May, 1922.

[SEAL.] WILLIAM R. CHOATE,
Notary Public.

My commission expires April 5, 1923.

56 In United States District Court.

Affidavit of J. P. Yoder.

CITY OF WASHINGTON,
District of Columbia, ss:

J. P. Yoder, being duly sworn, says:

That he is and at all of the times herein mentioned and also at all of the times mentioned in the petition and in the affidavit of James A. Horton, in the above-entitled proceeding, was the secretary of the relator, the Federal Trade Commission, and as such has the custody and control of the records of said commission, including its books of record, correspondence, etc.

That he has read the petition herein and the exhibits annexed to and a part thereof, and also the affidavit of James A. Horton, verified May 31, 1922.

That said James A. Horton was at all times mentioned in said petition and affidavit and still is a duly authorized agent and accredited representative of the Federal Trade Commission.

That the copy of the notice and demand addressed to American Tobacco Company, Incorporated, annexed to and a part of said petition and affidavit, is a true and correct copy of the original thereof, and that the same was drawn and delivered to the American Tobacco Company, Incorporated, pursuant to the order and direction of the Federal Trade Commission.

57 Deponent further says that the copies of the Exhibits A, B, C, and D are true and correct copies of the original thereof.

J. P. YODER.

Subscribed and sworn to before me this 31st day of May, 1922.

[SEAL.] WARREN R. CHOATE,
Notary Public.

My commission expires April 5, 1923.

Affidavit of James A. Horton.

In United States District Court.

[Title omitted.]

CITY OF WASHINGTON,
District of Columbia, ss:

James A. Horton, being duly sworn, says that he is an attorney and examiner in the employ of the Federal Trade Commission, the petitioner in the above-entitled proceeding, and that he was in such employ as aforesaid at all of the times herein mentioned.

That on or about October 5, 1921, he, in his representative capacity, and under the specific direction and authority of the Federal Trade Commission, called at the offices of the respondent at
28 No. 111 Fifth Avenue, New York City, for the purpose of making an examination of the records, data, and correspondence of said corporation with reference to its interstate business.

That at the said time and place, he had a conference with Junius Parker, the counsel of respondent. At that time there were present beside deponent and said Parker, Byron L. Shinn, attorney and examiner in charge of the New York office of the respondnt, H. L. Anderson, assistant chief examiner of respondent, and John Knox Arnold, special agent in the employ of respondent. At that time it was stated to said Junius Parker that deponent and his associates were there as representatives of and on behalf of the Federal Trade Commission, and that they were under instructions to institute an examination of the books, records, papers, documents, and correspondence of respondent relating to its business in interstate commerce, and they requested that arrangements be made, without delay, that they might have access to the files containing the records, documents, papers, and correspondence of respondent relating to its business in interstate commerce. In reply to said demand, Mr. Parker, on behalf of the American Tobacco Company, informed deponent and his associates that the American Tobacco Company would permit the Federal Trade Commission, by its representatives, to have access to the papers, documents, and correspondence of the respondent with its salesmen, but that the American Tobacco Company would not permit the commission or its representatives to have access to the records, data, documents, or correspondence of the American Tobacco Company from or to its jobber customers.

That thereafter deponent, accompanied by Jonathan
29 Holmes, the assistant to Mr. Parker, the general counsel, was taken to the office of Mr. DeCosta, the auditor of respondent. That Mr. Holmes told Mr. DeCosta that deponent, as representative of the Federal Trade Commission, was to have access to the files containing the sales correspondence, but that he was not to have access to the files containing the correspondence of respondent from or to its jobber customers. Mr. DeCosta thereupon took deponent to

a room which he termed the file room and stated contained the current files of respondent. Mr. DeCosta pointed out to deponent certain files in this room which he stated contained the correspondence of the then current year of respondent with its sales force. At the same time and in the same room he pointed out to deponent certain files which he stated contained the correspondence of the then current year of respondent with its jobber customers. Mr. DeCosta thereupon, in deponent's presence, directed Mr. Bushnell, who was an employee of respondent in charge of the file room, that deponent and his associates were to have access to the files containing the sale correspondence, but that they were not to have access, and that he should not permit them to have access to the files containing the correspondence of respondent from or to its jobber customers.

Deponent says that the room to which he was taken by Mr. DeCosta was located on one of the upper floors on the premises known as 111 Fifth Avenue, New York City, and was a room approximately thirty feet wide by sixty feet long and approximately twelve feet high.

This room contained file cases arranged around the sides and at various places running across said room, all being so arranged so as to give free access to the employes of said respondent assigned to the work of filing documents and correspondence of said respondent. That the file cases containing the sales correspondence were side by side with cases containing the correspondence with respondent's customers to which access was refused, both being in the same room with no partition or dividing wall and in charge of the same employes.

Respondent having refused deponent and his associates on behalf of the Federal Trade Commission access to certain of its files, deponent thereupon returned to Washington and reported the result of the conference had with Mr. Parker as herein set forth. Deponent was thereupon instructed to call upon respondent and inform respondent that the commission insisted upon its right to examine all of the correspondence, not only that had with its sales force but also that had with its customers, but that in view of respondent's refusal to permit access to that with its customers, that the commission's representatives would proceed with their examination of the files to which access would be permitted, and that in doing this it was to be distinctly understood that no rights whatsoever in the matter were waived and that deponent and his associates proceeded with their examination with that specific understanding.

That deponent and his associates thereafter from time to time and on various days examined the contents of the files containing the sales correspondence, all being done in the file room of respondent, at the premises as herein set forth.

That the files to which access was refused comprised approximately 600 drawers, and during the time that deponent and his

associates were there, from time to time, certain data were received in the file room and inserted in these files.

That deponent was informed by Mr. DeCosta that the files 61-62 of the respondent covering the time prior to the then current year of 1921 were located in the warehouse removed from the premises known as 111 Fifth Avenue. Mr. DeCosta accompanied deponent to this warehouse and permitted deponent and his associates to examine the files containing the correspondence of respondent with its sales force, but refused to permit examination of the files containing the correspondence with the customers, although said correspondence was contained in the same room as that to which deponent had access.

Deponent further says that the examination of the files of respondent showed that it did business in the States of Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, West Virginia, Wisconsin, and the District of Columbia, and the indications from the facts gathered by deponent from said correspondence are that its customers numbered in excess of five thousand.

JAMES A. HORTON.

Subscribed and sworn to before me this 31st day of May, 1922.

[SEAL.] WARREN R. CHOATE,
Notary Public.

My commission expires April 5, 1923.

63 *Notice of appearance and demand.*

U. S. District Court, Southern District of New York.

[Title omitted.]

SIR: Please take notice that the respondent, the American Tobacco Company, Inc., appears in this proceeding, and that I am retained as attorney for respondent therein and demand that a copy of all papers in this proceeding be served on me at my office, number 111 Fifth Avenue, New York City, N. Y.

New York, June 23rd, 1922.

Yours, &c.,

JUNIUS PARKER,
Attorney for Respondent.

Office and post office address: 111 5th Ave., New York City.

To WILLIAM HAYWARD, Esq., U. S. Atty.,
Solicitor for Petitioner.

64 *Note of issue.*

MOTION CALENDAR FOR JUNE 23, 1922.

United States District Court, Southern District of New York.

[Title omitted.]

WM. HAYWARD, U. S. Attorney,
Solicitor for Petitioner,
Federal Courts and P. O. Building.

Date of issue:

Nature of action: Suit in equity for writ of mandamus directing delivery of certain books, etc., for inspection, etc.

Note of issue for June 23, 1922.

Term 1922.

Calendar motion for writ of mandamus under Federal trade act filed by the United States.

65 *Stipulation extending time to answer, etc.*

U. S. District Court, Southern District of New York.

[Title omitted.]

It is hereby stipulated that the time for the respondent to answer, make return, or offer objections, demur to, or make any motion with relation to the petition in this proceeding may be, and hereby is, extended to and including the seventh day of July, 1922, the issue in said proceeding to date as if no extension had been granted.

Dated, June 23rd, 1922.

WM. HAYWARD, U. S. Atty.,
Solicitor for Petitioner.

66 *Answer and objections.*

United States District Court, Southern District of New York.

[Title omitted.]

I.

Now comes the above-named respondent, the American Tobacco Company, Inc., by Junius Parker and John Walsh, its attorneys, and objects in point of law to the papers on which the alternative writ of mandamus issued herein was granted on the ground that no reason in law is stated in the petition for the issuance of said alternative writ of mandamus, and the said petition does not (nor do the affidavits appended thereto) show that the said Federal Trade Commission is entitled to a writ of mandamus as prayed.

II.

And answering said petition and the affidavits appended thereto this respondent alleges as follows:

1. Admits the allegations of paragraphs 1, 2, 3, 4, 5, and 6 of the petition herein, but alleges that in addition to being engaged in interstate commerce in the manufacture and sale of tobacco and tobacco products as alleged in paragraph 4 of said petition, this respondent conducts a large business in the sale of tobacco and tobacco products to wholesalers and retailers in the same State in which said tobacco and tobacco products are manufactured, and causes the same to be transported only from the point of manufacture to purchasers
67 at points in the same State in which said products are manufactured, and not in interstate commerce; and that in the conduct of its business both in intrastate and interstate it keeps and maintains an office at the place designated in the petition where all of its books, writings, and correspondence and other documentary data relating to and bearing upon all of its business as aforesaid, as well as writings and correspondence informing it of the business, interstate and intrastate, of many of its customers, are kept and are in control of its officers, agents, and employees.

2. Admits that the Federal Trade Commission act, approved September 26, 1914, purports to give the Federal Trade Commission powers as set forth in section 6, subdivision (a), and in section 6, subdivision (d), thereof, and except as so admitted this respondent denies each and every allegation of paragraphs 7 and 8.

3. Admits that the respondent was informed by the petitioner that a complaint was filed with the petitioner, as alleged in paragraphs 9 and 10 of the petition, by some party whose name was not disclosed by petitioner to the respondent, charging respondent with attempting to regulate and fix the price at which commodities sold by it should be resold by those to whom it had sold them, but this respondent has never seen said complaint and has no information as to its exact tenor, and except as herein admitted this respondent denies each and every allegation of paragraphs 9 and 10 of the petition.

4. Admits the allegations of paragraph 11 of the petition, but alleges that said resolution No. 129 of the Senate of the Congress of the United States gave the petitioner no warrant or power in law to investigate or conduct an investigation of the business or affairs of respondent.

5. Alleges that it has no knowledge or information sufficient
68 to form a belief as to the allegations of paragraphs 12 and 13 of the petition, except the allegation of said paragraph 13 to the effect that the petitioner by its agents and representatives did gather and compile certain information relative to the respondent's business.

6. Denies that the refusal of the respondent to produce, for inspection, examination, and perusal by the petitioner's agents or repre-

sentatives, those parts of the correspondence and writings in its possession which it did refuse to produce, as alleged in paragraph 16 of the petition, was or is in violation of respondent's duty or in violation of the provisions of said Federal Trade Commission act.

7. Denies that the said documentary evidence, records, correspondence, and writings referred to in paragraphs 17, 18, 19, 20, 21, 22, 23, and 25 of the petition all relate to respondent's business in interstate commerce, but alleges that a part thereof relates to respondent's business in intrastate commerce and a part relates solely to the intrastate business of customers of respondent.

8. And specifically answering paragraphs 25, 26, and 27 of the petition herein, and the affidavit of James A. Horton, agent of the petitioner, appended to petition, respondent alleges that it was willing at all times mentioned in the petition and it is still willing to allow inspection by the petitioner or its accredited agent, not only of all papers, files, documents, and correspondence set out in the affidavit of said James A. Horton, but also of all correspondence which this respondent might have with its jobber customers which in any way relates to the refusal of the respondent to sell its products to any such jobber customers, and that this respondent informed said agent and representative of the petitioner of its willingness so to do.

9. Denies each and every allegation contained in para-
69 graphs 32, 33, 34, 36, and 37 of the petition.

10. Admits that there was served on this respondent the petitioner's complaint referred to in paragraph 38 of the petition herein as Exhibit "H," but alleges that the same was so served after the date the petition herein was verified, to wit, on the sixth day of June, 1922, and that thereafter and on the twenty-sixth day of June, 1922, this respondent filed with said petitioner its answer to said complaint denying all of the material allegations of said complaint, and that a copy of said answer is annexed hereto and marked "Exhibit A," and that said proceedings so instituted by the petitioner are at issue upon said complaint and this respondent's answer and said proceedings are now pending before and undetermined by the petitioner.

III.

And further answering said petition and the affidavits appended thereto, and objecting to the same in point of law, respondent alleges:

1. That the demands of the petitioner made upon the respondent for access to and inspection of the papers and correspondence of the respondent are unauthorized, illegal, unconstitutional, and void for the reason—

(a) That said demands, if enforced, would constitute an unreasonable search and seizure of the respondent's papers and effects, including letters written by its customers, corporations, copartnerships, and natural persons about their own business, intrastate as well as

interstate, without any warrant and without probable cause, and are not supported by oath or affirmation particularly describing the place to be searched or the specific papers or effects to be seized; and

(b) That said demands are unreasonable and arbitrary in scope, extent, and effect, and said demands, and said Federal Trade
70 Commission act, if it authorizes said demands, are in violation of the fourth article of amendment to the Constitution of the United States, and said demands, if enforced, would deprive the respondent and its customers of its and their liberty and property without due process of law in violation of the fifth article of amendment to the Constitution of the United States.

2. That the issuance of preemptory writ of mandamus issued herein would be in the circumstances alleged inequitable, unjust, and unnecessary, and not in exercise of sound judicial discretion.

Wherefore the respondent prays that the petitioner's application for a preemptory writ of mandamus be denied and that this proceeding be dismissed.

(Signed) JUNIUS PARKER,
General Counsel, the American Tobacco Company,
111 Fifth Avenue, New York, N. Y.
(Signed) THE AMERICAN TOBACCO CO.,
By PERCIVAL S. HILL, *Prest.*
(Signed) JOHN WALSH,
404 Southern Building, Washington, D. C.,
Counsel for Respondent.

71 *Exhibit A to answer and objections.*

UNITED STATES OF AMERICA,
Before the Federal Trade Commission:

[Title omitted.]

ANSWER OF AMERICAN TOBACCO COMPANY.

(Filed July 6, 1922.)

The American Tobacco Company, for its answer to the complaint herein to the effect that it has been and is using unfair methods of competition in interstate commerce, in violation of the provisions of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," alleges as follows:

Answering paragraph 1 of said complaint, this answering respondent,

1. Admits that it is a corporation organized under the laws of the State of New Jersey, that its principal office is in the city of Jersey City, in said State, with factories in several of the United States; that it is now, and has been for many years last past, engaged in the manufacture of cigarettes and other tobacco products and the sale

thereof to wholesale and retail dealers throughout the United States; that it causes its products when so sold to be transported from the point of manufacture to purchasers at points in other States of the United States; and that it is now, and has been for many years last past, in competition with the respondent, P. Lorillard Company, and other individuals, partnerships, and corporations similarly engaged
72 in the manufacture and/or sale of cigarettes and other tobacco products in interstate commerce, but denies that said competition is now or has been limited, prevented, or suppressed by respondent, as alleged in said complaint, or otherwise.

2. Further answering paragraph 1 of said complaint, this respondent alleges that it has no knowledge or information of the other matters therein alleged, and can, therefore, neither admit nor deny the same, and if they be material, demands strict proof thereof.

3. Further answering said complaint, this answering respondent alleges that, except as to those matters herein specifically admitted, and those matters of which it has no knowledge or information as herein alleged, it denies each and every allegation of said complaint.

Wherefore, it prays that the said complaint be dismissed.

AMERICAN TOBACCO COMPANY,
By PERCIVAL S. HILL,
Its President.

(Signed) JUNIUS PARKER,
JOHN WALSH,
Counsel for Respondent,
American Tobacco Company.

Service admitted.
U. S. District Court, S. D. of N. Y.

73 *Stipulation for adjournment.*

In the District Court of the United States for the Southern District of New York.

[Title omitted.]

It is hereby stipulated and agreed that the argument of the motion in the above-entitled proceeding, which is now set for August 3, 1922, shall, with the consent of both parties, be adjourned to September 7, 1922, or the first regular motion day after the first of September, all parties hereto specifically agreeing that no further adjournment for argument will be requested by any party for any cause whatsoever.

Dated July 12, 1922.

WILLIAM HAYWARD,
Attorney for Petitioner.
JUNIUS PARKER,
Attorney for Respondent.

ASB/PF.
7-12-22.

United States District Court, Southern District of New York.

THE FEDERAL TRADE COMMISSION, PETITIONER,
against
P. LORILLARD COMPANY, RESPONDENT.

FEDERAL TRADE COMMISSION, PETITIONER,
against
AMERICAN TOBACCO COMPANY, INC., RESPONDENT.

WILLIAM HAYWARD, Esq.,
United States Attorney,
Attorney for Petitioner.
W. H. FULLER, Esq.,
Chief Counsel for
Federal Trade Commission.
WILLIAM D. GUTHRIE, Esq.,
WILLIAM B. BELL, Esq.,
BERNARD HERSHKOPF, Esq.,
Of Counsel for Respondent
P. Lorillard Company.
JOHN WALSH, Esq.,
JUNIUS PARKER, Esq.,
JONATHAN H. HOLMES, Esq.,
Of Counsel for Respondent
American Tobacco Co., Inc.

These cases were argued together and will be considered in one opinion.

The petitioner in each of the above-named proceedings was granted an alternative writ of mandamus commanding the respondent to show cause why a peremptory writ should not issue directing that immediately it forthwith deliver into the possession of the Federal Trade Commission the accounts, books, records, documents, memoranda, papers, and correspondence of the respondent for inspection and examination and for the purpose of making copies thereof. The petition upon which the alternative writ was granted sets forth that on the 16th of September, 1921, a complaint was filed with the Federal Trade Commission against the respondent. The complaint alleged that the respondent in the conduct of its interstate commerce was indulging in practices which were in violation of the provisions of the act of Congress of September 26, 1914 (38 Stat. 717), in that the respondent was using certain methods of business practices resulting in unfair competition, and that it was regulating and fixing or attempting to regulate and fix the prices at which the commodities sold by it should be resold by those to whom it had sold them, and

was cooperating, aiding, and abetting others to successfully formu-
late and carry out a scheme or combination pursuant to which
75 the resale prices of respondent's commodities should be fixed
and maintained by those to whom respondent had previously sold its products or commodities. Further, that the Senate of the Congress of the United States by a resolution directing the Federal Trade Commission to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference as to the market price to producers of tobacco and the market price for manufacturing tobacco, and the price of leaf tobacco exported, and to report to the Senate as soon as possible the result of such investigation. Petitioner then sets forth that at various times between September 29, 1921, and November 5, 1921, authorized agents of the petitioner, in its behalf, demanded of the respondent to produce and furnish to them at respondent's offices certain specified documentary evidence or written data, correspondence, and other paper writings which were then and there in the possession, custody, and control of the respondent, so that copies thereof or parts thereof might be made. And the respondent, complying with the demands and pursuant to its duty under the provisions of the Federal trade act, did produce for inspection and examination of petitioner's agents certain of the data commanded, but in violation of provisions of the Federal trade act it refused to produce for inspection and examination "certain documentary evidence, records, correspondence, and writings herein specified, which were then and there in respondent's possession, custody, and control; and it refused to permit copies thereof to be made by petitioner." And it sets forth that it is necessary in the prosecution of its duty that such inspection and examination be granted to the petitioner's agents, and that it is hindered in the performance of its duty and in the exercise of its power by the refusal of the respondent to grant such examination and inspection. Its prayer for relief is that "all papers and telegrams received by the American Tobacco Company (P. Lorillard Company) from all of its jobber customers located in different points throughout the United States and also copies of all letters and telegrams sent by the American Tobacco Company (P. Lorillard Company) to such jobbers during the period of January 1, 1921, to December 31, 1921, inclusive," be turned over for examination and inspection. Each respondent resists the application for a peremptory writ, contending that the Federal Trade Commission is asserting authority which it does not possess in seeking to make an unlimited and unrestricted inspection with the right to copy all of the correspondence with its jobber customers. That the Senate resolution directing the Federal Trade Commission to make the investigation referred to grants no authority for unlimited and unrestricted search with the right to copy the correspondence. It further contends that secs. 5, 6, and 9 of the Federal Trade Commission act give no such authority of unlimited and unrestricted search and examination, and it is said that any such construction or interpretation of the Federal Trade

Commission act would be in contravention of the fourth amendment of the Constitution guaranteeing the right of the people to be secure in their papers and effects against unreasonable searches and seizures and that no warrant shall issue but upon probable cause supported by oath or affirmation. Thus the question is presented whether Congress can delegate visitorial powers under the commerce clause of the Constitution over private corporations engaged in interstate commerce to the extent of granting unlimited and unrestricted examination and inspection with the right to copy.

By the act of Congress of September 26, 1914, the Federal Trade Commission was created a body corporate. Its purposes were defined by the statute creating it, and its duties and powers and administration are referred to in secs. 5, 6, and 9. It is provided by sec. 9 of the act that—

"for the purposes of this act the commission or its duly authorized agent or agents shall at all reasonable times have access to, for the purpose of examination and the right to copy, any documentary evidence of any corporation being investigated or proceeded against." And sec. 6 of the act provides: "That the commission shall also have power (a) to gather and compile information concerning and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships."

76 The Constitution provides (Art. 1, sec. 8, cl. 3) that Congress shall have power to regulate commerce with foreign nations and among the several States.

Each respondent is conceded to be a private corporation engaged in selling tobacco and its products and is engaged in interstate and intrastate commerce. This investigation was commenced "for the purpose of ascertaining the facts relating to respondent's business." The business of each of the respondents is very extensive, its letters, papers, and other documents making it a business of thousands of letters per month. The affidavits submitted by the respondents set forth a mass of correspondence and other documentary evidence which, if the petitioner prevails in its alleged right to "full and complete access to any and all documentary evidence in the possession and control of the respondent," would, it is alleged, handicap the respondent in its business and entail considerable expense and difficulties. Much of the correspondence relates to transactions bearing upon intrastate commerce only. As to such of the correspondence as bears upon intrastate commerce, the petitioner is not entitled to examination, inspection, or copying any part thereof. The commerce clause of the Constitution granting power to the Congress to legislate as to the commerce permits only of legislation which has to do with interstate commerce. The Federal trade act forbids unfair practices in reference to the commerce of an interstate character only. (Ward Packing Co. vs. Federal Trade Comm., 264 Fed. 330.) The

commerce clause of the Constitution vested in the Congress "a full and complete power to regulate commerce among the several States, for the strong arm of the National Government may be put forth to brush away all obstacles to interstate commerce." (In re Debs, 158 U. S. 564.) And "Constitutional privileges do not change, but their operation extends to new matters as modes of business, and the habits of life of the peoples vary with each succeeding generation. The power is the same, but it operates to-day upon modes of interstate commerce unknown to the fathers and will operate with equal force upon any new modes of such commerce which the future may develop." (Gibbons vs. Ogden, 22 U. S. 1.) The power of Congress to legislate embraces not only to regulate and control that which is wholly interstate, but also that which even though intrastate affects the free flow of interstate commerce. (Minn. Rate Cases, 230 U. S. 352.) To regulate is the power to enact legislation directly affecting interstate commerce. (United States vs. Adair, 152 Fed. 737.) The Constitution having granted to the Congress plenary power to regulate or control commerce among the States, Congress may delegate such duties to investigate and learn conditions to a permanent administrative body.

The validity of the Interstate Commerce Commission act granting to that commission the power to investigate facts relating to interstate transportation was considered in Interstate Commerce Commission vs. Brimson (154 U. S. 447). It has been held that the visitorial power of the Federal Government provided for in the act over private corporations must be restricted to activities of an interstate commerce character. (Hale vs. Henkel, 201 U. S. 43; Interstate Commerce Comm. vs. Goodrich Co., 224 U. S. 194; United States vs. Basic Products Co., 260 Fed. 472.) We must presume that the Congress did not intend by this legislation to invade the field reserved under the Constitution to the several States by interfering with transactions in intrastate commerce. "The statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." (United States vs. Jim Fuey Moy, 241 U. S. 394; see also United States vs. D. & H. Co., 213 U. S. 366.)

The resolution of the Senate provided that "the Federal Trade Commission be, and is hereby, directed to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference to the market price to producers for tobacco and the market price for manufactured tobacco and the price of leaf tobacco exported, and report to the Senate as soon as possible the result of such investigation." This resolution has not the mandatory effect of statutory enactment with reference to the commerce clause of the Constitution, and the present application for the writ must rest by reason of the command of sec. 9 of the Federal Trade Commission act, wherein jurisdiction is granted to the district
76½ courts of the United States "to issue writs of mandamus commanding any person or corporation to comply with the provi-

sions of this act or any order of the commission made in pursuance thereof." The resolution of the Senate does not come within the terms of the authority conferred by the statute in question. Under sec. 6, power is conferred upon the commission "upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust acts by any corporation," but the language of this statute makes it necessary for one of the Houses of Congress to adopt a resolution for a direction to investigate, and reporting such investigation must be for alleged violation of the antitrust acts. The quotation from the resolution of the Senate fails to indicate that it is founded upon any violation or alleged violation of the antitrust law. It does not indicate that the Senate intended that any antitrust law violation should be investigated by the commission. If so, an apt expression to that effect could have been used. It can not, therefore, be concluded that it was intended, in the language used, to investigate any violations of the antitrust acts by any corporation. In any case the power of the Federal Trade Commission can not be broader than what Congress did or could delegate. The analogy of the cases arising under the powers of the Interstate Commerce Commission with that of the Federal Trade Commission's powers is pertinent. This was referred to in Beechnut Packing Co. vs. Federal Trade Comm. (264 Fed. 885). A comparison of the statutes particularly setting forth the procedure under the two acts shows the similarity. In each any person may be compelled to appear and depose and produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission. Both commissions are required to make findings and proceedings before them, and the findings must be based upon the testimony given.

In the Harriman case (211 U. S. 417), Justice Holmes said:

"The commission * * * is given power to require the testimony of witnesses 'for the purpose of this act.' The argument for the commission is that the purposes of the act embrace all the duties that the act imposes and the powers that it gives the commission; that one of the purposes is that the commission shall keep itself informed as to the manner and method in which the business of carriers is conducted, as required by section 12; that another is that it shall recommend additional legislation * * * and that for either of these general objects it may call on Congress to require anyone whom it may point out to attend and testify if he would avoid the penalties for contempt.

"We are of the opinion, on the contrary, that the purposes of the act for which the commission may exact evidence embraces only complaints for violation of the act, and investigations by the commission upon matters that might have been made the object of the complaint. As we have already implied, the main purpose of the act was to regulate the interstate-commerce business of carriers, and the secondary purpose, that for which the commission was established, was to en-

force the regulations enacted. These, in our opinion, are the purposes referred to; in other words, the power to require testimony is limited, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law.

"If we felt more hesitation than we do, we still feel bound to construe the statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits."

The Interstate Commerce Commission deals with quasi public corporations. But the phrase of the Federal Trade Commission act considered, in view of the language in the Harriman case, would indicate that the right to procure information in its investigations under the provisions of sec. 6 would not grant the unlimited search and inspection of correspondence with the right to copy the same in the absence of some specific complaint which would point out the materiality to that complaint of the particular correspondence and papers sought to be obtained.

77 Reading secs. 5, 6, and 9, I do not think that Congress intended at the time of the enactment of this law to go beyond the well-recognized principles of limitations with reference to searches and seizures guarded against by the fourth amendment of the Constitution. It is better to deduce the intention that information should only be extracted by the procedure long established in the courts in conformity with the constitutional guarantee against unlawful and unreasonable searches and seizures and the right of people to be secure in their papers and effects therefrom. The fourth amendment provides:

"The right of the people to be secure in their * * * papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This command of the Constitution, properly interpreted, is a prohibition against Congress granting powers to the commission for unlimited searches and seizures of letters and documents. The act makes plain the duty of the commission to gather, compile, and publish for use in its proceedings what may be voluntarily offered or submitted in response to request or demand. It may also make investigation independently, but the exercise of visitorial power over private corporations must keep within the restrictions of the fourth amendment. "Neither branch of the legislative department, still less any merely administrative body established by the Congress, possesses or can be vested with a general power of making inquiry into the private affairs of a citizen." (Interstate Commerce Comm. vs. Brimson, 154 U. S. 478.)

As was said by Mr. Justice Brewer in In re Pacific Ry. Comm. (32 Fed. 241):

"There is no doubt that Congress may authorize a commission to obtain information upon any subject which, in its judgment, it may

be important to possess * * *. But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters."

It is the duty of the court to so construe the act as to save the statute from constitutional infirmity. (Knights Templar Indemnity Co. vs. Jarman, 187 U. S. 197; U. S. vs. D. & H. Co., 213 U. S. 407; Harriman vs. Interstate Commerce Comm., 211 U. S. 401.)

Section 6 (b) grants to the commission the right to require corporations coming within its jurisdiction to make reports concerning their affairs and thus to furnish to the commission such information as it may require. And subdivision (a) of sec. 6 calls upon the corporations in question to report upon specific matters as provided in subdivision (b). If the corporations fail in reporting or are false, the commission is entitled, upon properly showing the probable cause, to demand due disclosures and access to the inspection of any specific, necessary, and relevant papers, excluding such papers as may be privileged. In other words, there must appear to be some reasonable cause for a search such as a definite complaint charging a specific wrong and thus presenting an inquiry which would have reasonable and readily ascertainable limits. Such a construction of subdivisions (a) and (b) of sec. 6 would effectuate the intent of Congress and the procedure can be kept within constitutional limits. (United States vs. L. & N. R. R., 236 U. S. 318; Veeder vs. United States, 252 Fed. 414.) Such a construction would seem to be in accord with the discussions in the Senate when this legislation was enacted. (See 51 Congressional Records, part 13, 63rd Congress, second session, pp. 12747, 12800, 12806–11, 12918, 12927.) It was not intended to grant an unlimited power of inquisition or an unlimited right of access to books and papers of private parties not engaged in any public service or a search without basis of some facts tending to establish a charge of wrongdoing.

78 It is now well established that a corporation is entitled to invoke the guarantees of the fourth amendment against unreasonable searches and seizures is as full a measure as would a person or partnership. (Silverthorne Lumber Co. vs. United States, 251 U. S. 385; Coastwise Lumber Co. vs. United States, 259 Fed. 847.)

In the papers submitted on this application there is no show of the existence of probable cause. The relief prayed for is in general terms and includes all papers and telegrams received by each respondent from its jobber customers located in different points throughout the United States and copies of all letters and telegrams sent by each respondent to such jobbers during the period from January 1, 1921, to December 31, 1921, inclusive. Such general demands made in other warrants of law, such as a subpœna duces tecum have been condemned as not giving a reasonably accurate description of the papers wanted, either by date, title, substance, or subject to which they relate. (Ex Parte Brown, 72 Mo. 83; Carson vs. Hawley, 82 Minn. 204.)

In Boyd vs. United States (116 U. S. 616) the court quoted with approval Judge Camden's language in Entick v. Carrington and Three Other King's Messengers (19 Howell's State Trials, 1029) wherein he said:

"Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye can not by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society."

To grant the relief prayed for by the petitioner would be to permit of an unreasonable search and seizure of papers in violation of the fourth amendment. It was not the intention of Congress to grant such unlimited examination and inspection by the legislature in question nor, indeed, did Congress have authority to do so under the commerce clause of the Constitution. It would be unreasonable and unjust to accede to the demands of the petitioner, and the application for the peremptory writ of mandamus against the respondents American Tobacco Company and P. Lorillard Company is denied.

Dated October 3, 1922.

MANTON,
United States Judge.

79 *Notice of settlement.*

United States District Court, Southern District of New York.

[Title omitted.]

SIR: Please take notice that an order, of which the annexed is a copy, will be presented to Hon. Martin T. Manton, Circuit Judge, for settlement and signature, on the 9th day of October, 1922, at 10.30 o'clock in the forenoon, at the office of the clerk of this court in the Federal Courts and Post Office Building in the Borough of Manhattan, city of New York.

Dated, New York, October 4, 1922.

JOHN WALSH,
JUNIUS PARKER,
JONATHAN H. HOLMES,
Attorneys for Respondent.

To: Hon. WILLIAM HAYWARD,
U. S. Attorney,
Attorney for petitioner, Federal Courts and Postoffice Building, Borough of Manhattan, New York City.

80 *Order denying petition for mandamus.*

(Filed Oct. 9, 1922.)

At a stated term of the U. S. District Court held in and for the Southern District of New York in the Federal Courts and Post Office Building in the Borough of Manhattan, city and county of New York, on the 9th day of October, 1922.

Present: Hon. Martin T. Manton, Circuit Judge.

[Title omitted.]

This case came on to be heard at this term and was argued by counsel and thereupon, upon consideration thereof, it was

Ordered, adjudged, and decreed that the application of the petitioner for a peremptory writ of mandamus herein be, and the same is hereby, in all respects denied upon the merits.

MANTON,
U. S. C. J.

Service admitted.
U. S. District Court, S. D. of N. Y.

81 *Order to show cause.*

(Filed Dec. 19, 1922.)

United States District Court, Southern District of New York.

[Title omitted.]

Upon the annexed affidavit of Adrien F. Busick, verified the 14th day of December, 1922, and upon all of the proceedings had herein, it is

Ordered, that the respondent show cause before me at my chambers, in Room 431, Old Post Office Building, in the Borough of Manhattan, city of New York, at 10 o'clock a. m., Saturday, December 16, 1922, why the above-entitled proceeding should not be transferred from the equity side to the law side of the court, without prejudice to the proceedings heretofore had herein; and it is

Further ordered, that service upon Junius Parker, Esq., attorney for respondent, on or before December 15, 1922, shall be deemed sufficient service of this order.

Dated New York, December 14, 1922.

MANTON,
Circuit Judge.

Service admitted.
U. S. District Court, S. D. of N. Y.

82 *Affidavit of Adrien F. Busick.*

United States District Court, Southern District of New York.

[Title omitted.]

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Adrien F. Busick, being duly sworn, deposes and says that he is an attorney on the staff of the Federal Trade Commission and is associated with the United States attorney for the Southern District of New York in this proceeding.

This proceeding was commenced on the 13th day of June, 1922, by the filing of a petition for a writ of mandamus directed to the respondent, and an order granting an alternative writ of mandamus was issued on the same date.

An alternative writ was issued pursuant to an order on June 14, 1922.

Respondent filed its answer herein on the 6th day of July, 1922.

The cause was heard by the court on the petition, alternative writ, and answer on September 7, 1922.

On October 9, 1922, a final order was entered dismissing the petition in all respects on the merits.

Deponent further alleges that the petition herein prayed for the issuance of a writ of mandamus, pursuant to the provisions of the act of Congress entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved Sept. 26, 1914, to compel the respondent to afford the petitioner access to certain documents, papers, and correspondence.

83 Upon information and belief that such writ of mandamus should have issued out of the law side of the court, but through inadvertence and mistake the petition was docketed and all proceedings had herein on the equity side of the court and the order was entered on that side of the court.

Deponent, therefore, respectfully requests that the court issue an order herein, directing the respondent to show cause before it at a time to be fixed in the order why this proceeding should not be transferred from the equity side to the law side of the court, nunc pro tunc, as of June 13, 1922, the respondent's answer to stand as its return to the alternative writ, and the transfer to be otherwise without prejudice to any proceedings heretofore taken herein, and for such other and further relief as to the court may seem proper.

ADRIEN F. BUSICK.

Sworn to before me this 14th day of December, 1922.

[NOTARIAL SEAL.]

CARL BRECKER,
Notary Public, N. Y. C.

84 *Notice of settlement.*

United States District Court, Southern District of New York.

[Title omitted.]

SIR: Please to take notice that the within is a copy of an order which will be presented for settlement and signature to Honorable Martin T. Manton, United States Circuit Judge, at the office of the clerk of this court, Room No. 349, in the United States Courts and Post Office Building, Borough of Manhattan, city of New York, on the 18 day of December, 1922, at 10½ o'clock in the forenoon.

Dated New York, December 16, 1922.

Yours, etc.,

WILLIAM HAYWARD,
United States Attorney for the Southern District of New York, Attorney for Plaintiff. Office & Post Office Address: U. S. Courts & P. O. Building, Borough of Manhattan, City of New York.

To: JUNIUS PARKER, Esq.,
Attorney for Defendant, 120 Broadway, New York City.

85 [Title omitted.]

Due service of a copy of the within is hereby admitted.

New York, December 16, 1922.

JUNIUS PARKER,
Attorney for Respondent.

86 *Order transferring cause to law court.*

(Filed Dec. 19, 1922.)

In the United States District Court for the Southern District of New York.

[Title omitted.]

This proceeding came on to be heard on an order to show cause why the proceeding should not be transferred from the equity side to the law side of the court, and after hearing Adrien F. Busick, of counsel for the petitioner, in support of the order, it is

Ordered, that the proceeding be, and the same is hereby, transferred from the equity side to the law side of the court, nunc pro tunc, as of June 13, 1922, the respondent's answer to stand as its return to the alternative writ, the transfer to be otherwise without prejudice to the proceedings heretofore had herein.

Dec. 18, 1922.

MANTON,
Circuit Judge.

Service admitted.
U. S. District Court, S. D. of N. Y.

87 *Assignment of errors.*

(Filed Jan. 2, 1923.)

In the District Court of the United States for the Southern District of New York.

[Title omitted.]

Now comes the Federal Trade Commission, the plaintiff in this action, and in connection with and as a part of its petition for a writ of error filed herein makes the following assignments of errors which it avers were committed by the court in the rendition of the judgment against this plaintiff appearing upon the record herein, that is to say:

1. The court erred in holding and adjudging that the allegations in the plaintiff's petition did not entitle it to the issuance of a peremptory writ of mandamus as prayed for in the plaintiff's petition.

2. The court erred in holding and adjudging that respondent's return to the alternative writ of mandamus presented a valid or sufficient defense to the issuance of the peremptory writ as prayed for in the petition.

3. The court erred in not awarding the peremptory writ of mandamus.

4. The court erred in holding that the Federal Trade Commission act does not authorize the commission to examine, inspect, and copy correspondence relative to the transactions in intrastate commerce of corporations engaged also in interstate commerce where the transactions in intrastate commerce may throw light upon the conduct, organization, management, business, and practices of the corporation's interstate commerce and upon the question whether
88 the corporation is engaged in the use of unfair methods of competition in interstate commerce.

5. The court erred in holding that Congress could not constitutionally authorize the commission to inspect and copy correspondence relative to the transactions in intrastate commerce of corporations engaged also in interstate commerce, where the transactions in intrastate commerce may throw light upon the conduct, organization, management, business, and practices of the corporation in interstate commerce, and upon the question whether the corporation is engaged in the use of unfair methods of competition in interstate commerce.

6. The court erred in holding that Congress could not constitutionally authorize the commission to inspect and copy correspondence relative to the transactions in intrastate commerce of corporations engaged also in interstate commerce, and the relation which such corporations bear to other corporations and to individuals, associations, and partnerships.

7. The court erred in holding that Congress could not constitutionally authorize the commission to inspect and copy correspondence relative to the transactions in intrastate commerce of corpora-

tions engaged also in interstate commerce, where the transactions in intrastate commerce show the relation of such corporations to other corporations and to individuals, associations, and partnerships.

8. The court erred in holding that the commission's power to investigate the conduct, organization, management, business, and practices of corporations engaged in interstate commerce, and in connection with such investigation to procure information under section 6 (a) and section 9 of the Federal Trade Commission act does not include the right to inspect and copy documents of corpora-
89 tions engaged in interstate commerce unless a definite complaint, charging a specific violation of law, has been issued, and the materiality to that complaint of the particular correspondence and papers sought to be obtained made to appear.

9. The court erred in holding that Congress can not constitutionally empower the commission to investigate the conduct, organization, management, business, and practices of corporations engaged in interstate commerce, and in connection with such investigation confer also the right to inspect and copy documents of corporations engaged in interstate commerce, unless a definite complaint, charging a specific violation of law, has been issued, and the materiality to that complaint of the particular correspondence and papers sought to be obtained made to appear.

10. The court erred in holding that section 6 (a) of the Federal Trade Commission act authorized the commission to gather and compile only such information respecting the conduct, organization, management, business, and practices of corporations engaged in interstate commerce as may be voluntarily given.

11. The court erred in holding that Congress can not constitutionally empower the Federal Trade Commission to gather and compile information respecting the conduct, organization, management, business, and practices of corporations engaged in interstate commerce, and confer upon said commission the right to have access to, for purposes of inspection, and to copy, books, documents, papers, and correspondence respecting the interstate commerce of corporations engaged in such commerce.

12. The court erred in not holding that section 9 of the Federal Trade Commission confers authority upon the commission to inspect the books, documents, papers, and correspondence, and to make copies thereof, of any corporation engaged in interstate commerce whose conduct, organization, management, business, and
90 practices are being investigated by the commission under authority of section 6 (a).

13. The court erred in holding that Congress can not constitutionally confer upon the commission authority to demand access to, for the purpose of inspection, books, documents, papers, and correspondence respecting the interstate commerce of corporations engaged in such commerce, for the purpose of making reports to

Congress, and of publishing facts respecting the business and practices of such corporations, within the limits laid down in section 6, paragraphs (a), (b), and (f) of the Federal Trade Commission act.

14. The court erred in holding that section 6 (a) and section 9 of the Federal Trade Commission act do not authorize the commission to require access to, and the right to inspect, books, documents, papers, and correspondence relating to the interstate commerce of a corporation engaged in such commerce, and to make copies thereof, unless the commission has issued a complaint charging a specific violation of law.

15. The court erred in not holding that the commission is authorized, under section 6 (a) and section 9 of the Federal Trade Commission act, to require access to, and the right to copy, documents, papers, and correspondence of the defendant corporation for the purpose of determining whether there is reason to believe that an unfair method of competition is being used by it in violation of section 5 of the Federal Trade Commission act, where a charge has been lodged with the commission that the defendant is using a method of competition which has been held to be a violation of the said section 5.

16. The court erred in not holding that Congress can constitutionally authorize the commission to require access to, and the right to copy, documents, papers, and correspondence of the defend-
91 ant corporation for the purpose of determining whether there is reason to believe that an unfair method of competition is being used by it in violation of section 5 of the Federal Trade Commission act, where a charge has been lodged with the commission that the defendant is using a method of competition which has been held to be a violation of said section 5.

17. The court erred in not holding that the commission is authorized by section 6 (a) and section 9 of the Federal Trade Commission act to inspect, with the right to copy, specified books, record, papers, or correspondence relating to the interstate commerce of corporations engaged in such commerce, for the purpose of ascertaining, on its own motion, whether there is reason to believe that an unfair method of competition is being used in violation of section 5 of the Federal Trade Commission act.

18. The court erred in holding that the commission must establish, from sources other than the books, documents, papers, and correspondence of the defendant corporation, that there is probable cause to believe that it is violating some law which the commission is charged with enforcing before any access to the corporate books, documents, papers, and correspondence can be had.

19. The court erred in holding that the papers submitted on the application for a writ of mandamus did not disclose probable cause to believe that the defendant corporation was employing, in combination with jobbers of products sold by it, cooperative means of fixing and maintaining prices at which the products made and sold by it should be resold by jobbers.

20. The court erred in holding that Congress can not constitutionally confer upon the commission the power to demand access to, and the right to inspect, the books, documents, papers, and correspondence relating to the interstate commerce of corporations
92 engaged in such commerce, in connection with the making of investigations respecting the conduct, organization, management, business, and practices of corporations engaged in interstate commerce, for the purpose of reporting the facts to Congress, and of making public such parts theerof as the commission may deem to the public interest.

21. The court erred in holding that the Federal Trade Commission act does not confer upon the commission authority to require access to the limited number of documents, papers, and correspondence of the respondent specified in the prayer of the petition, with the right to copy such parts thereof as may be deemed desirable, for the purpose of making reports to Congress respecting conditions in interstate commerce.

22. The court erred in holding that Congress could not constitutionally confer upon the commission authority to require access to the limited number of documents, papers, and correspondence of the respondent specified in the prayer of the petition, with the right to copy such parts thereof as may be deemed desirable, for the purpose of making reports to Congress respecting conditions in interstate commerce.

23. The court erred in holding that the Federal Trade Commission act does not confer upon the commission authority to require access to the limited number of documents, papers, and correspondence of the respondent specified in the prayer of the petition, with the right to copy such parts thereof as may be desired, for the purpose of ascertaining whether there is reason to believe that a charge lodged with the commission that the respondent is engaging in the use of unfair methods or competition in violation of section 5 of the Federal Trade Commission act is well founded.

24. The court erred in holding that Congress could not constitutionally confer upon the Federal Trade Commission the power to require access to the limited number of documents, papers, and
93 correspondence of the respondent specified in the prayer of the petition, with the right to copy such parts thereof as may be desired, for the purpose of ascertaining whether there is reason to believe that a charge lodged with the commission that the respondent is engaging in the use of unfair methods of competition in violation of section 5 of the Trade Commission act is well founded.

25. The court erred in holding that the Federal Trade Commission act does not confer upon the commission authority to require access to the limited number of documents, papers, and correspondence of the respondent specified in the prayer of the petition, with the right to copy such parts thereof as may be desired, for the purpose of proving the charges in a formal complaint issued by the commission

charging the respondent with the use of unfair methods of competition in violation of section 5 of the Trade Commission act.

26. The court erred in holding that Congress could not constitutionally confer upon the commission authority to require access to the limited number of documents, papers, and correspondence of the respondent specified in the prayer of the petition, with the right to copy such parts thereof as may be desired for the purpose of proving the charges in a formal complaint issued by the commission charging the respondent with the use of unfair methods of competition in violation of section 5 of the Trade Commission act.

27. The court erred in holding that a corporation engaged in interstate commerce is entitled to the protection of the fourth amendment to the Constitution of the United States in as full a measure as is a natural person.

28. The court erred in holding that the commission was asserting a right under the statute to an "unlimited search and inspection"
of the books, documents, papers, and correspondence of the
94 defendant. The right of access and inspection asserted by the commission is to be measured by the prayer of the petition, which was limited to correspondence with a special class of customers and associations of such customers, correspondence with its sales forces, agreements or contracts with associations of tobacco jobbers and wholesale grocers, correspondence and contracts or agreements with approximately eight competitors; all for a period of approximately one year.

29. The court erred in holding that the commission's notice and demand, limited as it was and made under authority of an act of Congress, passed in the exercise of the power to regulate interstate commerce, amounted to an unreasonable search and seizure of the papers and effects of the defendant corporation, within the prohibition of the fourth amendment to the Constitution of the United States.

30. The court erred in holding: "It is now well established that a corporation is entitled to invoke the guarantees of the fourth amendment against unreasonable searches and seizures in as full a measure as would a person or partnership."

31. The court erred in holding that a demand for access to, for the purpose of inspection and copying of, books, documents, papers, and correspondence relating to the interstate commerce of a corporation engaged in such commerce, made under the authority of an act of Congress in the exercise of the visitorial power of Congress over the interstate commerce of corporations engaged in such commerce, amounts to an unreasonable search and seizure within the prohibition of the fourth amendment to the Constitution of the United States.

32. The court erred in not holding that Congress, in exercising its power under the Constitution to regulate commerce, had the
95 right to examine the books and papers and correspondence of any corporation engaged in interstate commerce, and that the

only limitation upon this right is that such demand and investigation must be reasonable so as to not interfere unnecessarily with the conduct of the business of the corporation being investigated.

33. The court erred in failing to distinguish between those cases where the courts have invoked on behalf of individuals the fourth and fifth amendments in regard to the examination of the private effects of the individual, and also cases where it had been invoked in favor of corporations in case of subpœna duces tecum, the enforcement of which would denude the office of the corporation being investigated and prevent it from carrying on its business for an indefinite time; and the case at bar, where, under the very provisions of the Federal Trade Commission act, no corporation can be investigated that is not engaged in interstate commerce; and, second, that no interruption is caused in the conduct of the business of the corporation, as no books are sought to be taken under the writ desired in this case from the office or possession of the corporation.

34. The court also erred in not holding that the fourth and fifth amendments did not apply to a corporation engaged in interstate commerce and that was being investigated by an agency created by Congress for the purpose of ascertaining the manner in which such corporation is conducting its interstate business, unless such investigation is conducted in an unreasonable way so as to wantonly and unnecessarily interfere with the conduct and continuation of the business of such corporation during such investigation.

HARRY M. DAUGHERTY,
Attorney General of the United States.
WILLIAM HAYWARD,
U. S. Attorney for the Southern District of New York.

Service admitted.
U. S. District Court, S. D. of N. Y.

96-97 *Consent to amendment of record.*

In United States District Court.

[Title omitted.]

It is hereby consented that a prayer for reversal, of which the attached is a copy, may be added to the record on appeal to the Supreme Court of the above-entitled case, as if same had been a part of the assignment of errors.

New York, January 23, 1923.

JUNIUS PARKER,
Attorney for defendant in error.

98 *Prayer for reversal.*

In United States District Court.

[Title omitted.]

And now comes the Federal Trade Commission, the plaintiff in error, by the Attorney General of the United States, and prays for a

reversal of the judgment of the United States District Court for the Southern District of New York in the proceeding brought by the Attorney General of the United States at the request and in the name of the Federal Trade Commission, which judgment was entered in the office of the clerk of said United States District Court for the Southern District of New York on or about the 9th day of October, 1922.

HARRY M. DAUGHERTY,
Attorney General of the United States.
WILLIAM HAYWARD,
United States District Attorney for the Southern District of New York.

January 23, 1923.

98½ *Petition for writ of error at law.*

The District Court of the United States for the Southern District of New York.

[Title omitted.]

And now comes the Federal Trade Commission, plaintiff herein, and says:

That on or about the 9th day of October, 1922, the District Court entered a judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

HARRY M. DAUGHERTY,
Attorney General of the United States.
WILLIAM HAYWARD,
United States Attorney for the Southern District of New York.

99 *Citation and service.*

(Filed Jan. 2, 1923.)

UNITED STATES OF AMERICA, *ss:*

The Honorable John C. Knox, one of the United States District Judges for the Southern District of New York, in the second circuit, to American Tobacco Company, Incorporated, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days

from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein the Federal Trade Commission is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district and circuit above named, this 2d day of January, in the year of our Lord one thousand nine hundred and twenty-three, and of the Independence of the United States the one hundred and forty-seventh.

[SEAL.] JNO. C. KNOX,
United States District Judge for the Southern District of New York, in the Second Circuit.

100 [File endorsement omitted.]

Due service of within citation admitted.

January 2, 1923.

JUNIUS PARKER,
Atty. for Deft. in Error.

101 *Stipulation as to transcript.*

United States District Court, Southern District of New York.

[Title omitted.]

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated

WM. HAYWARD,
U. S. Attorney,
Attorney for Plff. in Error.
J. PARKER,
Attorney for Deft. in Error.

[File endorsement omitted.]

(Endorsed on cover:) File No. 29365. S. New York. D. C. U. S. Term No. 815. Federal Trade Commission, plaintiff in error, vs. American Tobacco Company. Filed January 27th, 1923. File No. 29365.

○

FILED
MAR 4 1926
WM. R. STANSBURY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1925.

No. 206.

FEDERAL TRADE COMMISSION, PLAINTIFF IN ERROR,

v.

AMERICAN TOBACCO COMPANY.

No. 207.

FEDERAL TRADE COMMISSION, PLAINTIFF IN ERROR,

v.

P. LORILLARD COMPANY, INC.

ON WRITS OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

FEDERAL TRADE COMMISSION, PLAINTIFF in error, *v.* AMERICAN TOBACCO COMPANY. } No. 206.

FEDERAL TRADE COMMISSION, PLAINTIFF in error, *v.* P. LORILLARD COMPANY, INC. } No. 207.

ON WRITS OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

These two cases were argued together in the court below and decided in one opinion. They are therefore briefed together here, such incidental differences as exist with respect to the facts or the points of law involved being pointed out.

The cases come to this court on writs of error to the United States District Court for the Southern

District of New York to review the decision of that court which denied the plaintiff in error, the Federal Trade Commission (hereinafter referred to as the Commission), peremptory writs of mandamus commanding the defendants in error, the American Tobacco Company and P. Lorillard Company, hereinafter styled the Tobacco Companies (unless specifically named), to give the Commission access to certain contracts and correspondence files for the purpose of inspecting the same and taking copies of such parts thereof as to the Commission might appear desirable.

The Attorney General of the United States acting upon the request and on behalf of the Commission pursuant to Section 9 of the Trade Commission Act (38 Stat. 717, Ch. 311) on June 13, 1922, filed separate petitions against the Tobacco Companies praying that alternative writs of mandamus issue commanding them, unless the letters and telegrams passing between their companies and their jobber customers over the period specified in the petition be submitted to the duly authorized agent of the Commission for inspection and examination, to show cause on a day fixed by the court why peremptory writs of mandamus should not issue commanding them so to do.

The companies filed an answer and objections and the case was heard on the pleadings. From a judgment denying the petitions for peremptory writs in all respects on the merits, writs of error were sued out directly to this court.

THE FACTS.

THE CASE AGAINST THE AMERICAN TOBACCO COMPANY.

The material facts alleged in the Government's petition against this company (Amer. Rec. p. 5)[1] may be thus summarized.

The company is engaged in the purchase of leaf tobacco, in its manufacture into various forms and products, and in the sale of the finished products in interstate and foreign commerce, as well as in intrastate commerce. The company maintains extensive offices and large factories in the Southern District of New York, and its principal books of account, records, and correspondence files are kept there.

On August 9, 1921, the United States Senate passed a resolution (No. 129) (Amer. Rec. p. 11) directing the Federal Trade Commission—

> To investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference as to market price to producers for tobacco and the market price for manufactured tobacco and the price of leaf tobacco exported, and report to the Senate as soon as possible the result of such investigation.

On or about September 16, 1921, there was filed with the Commission a complaint charging that the American Tobacco Company was violating Section 5 of the Trade Commission Act in that it was a party to a combination, to fix and regulate the re-

[1] The abbreviation "Amer. Rec." refers to the record in the case against the American Tobacco Company, No. 206.

sale prices at which commodities manufactured and sold by the company should be resold in interstate commerce by those to whom it had disposed of its products.

The Commission, in accordance with its usual practice of making preliminary inquiry before issuing a formal complaint and for the purpose of informing the Senate of the United States, as directed in the resolution before quoted, formally determined to institute an investigation into the organization, business, conduct, practices, and management of the tobacco companies and into the alleged violation of Section 5 of the Trade Commission Act. Copy of the resolution instituting this inquiry will be found at p. 11 of the record in the case against the American Company. The Commission, pursuant to this resolution, embarked upon the investigation and compiled certain information relating to the conduct of the interstate commerce of the company, in the course of which inquiry the company permitted inspection by the Commission of certain books and documents. (Amer. Rec. pp. 6–7.) The company refused, however, to permit inspection of certain other documents and correspondence files, whereupon the Commission through its duly authorized agent served a formal notice and demand for access to certain records, documents and correspondence of the company. The papers to which access was demanded were described in the written demand as follows:

> All letters and telegrams received by the American Tobacco Company from all of its

jobber customers located at different points throughout the United States, and also copies of all letters and telegrams sent by the American Tobacco Company to such jobbers during the period of January 1, 1921, to December 31, 1921, inclusive. (Amer. Rec. p. 19.)

The company refused to comply with the demand. (Amer. Rec. p. 8.)

The Commission on January 17, 1922, made a preliminary report to Congress in writing setting forth the facts developed by the Commission's investigation in response to its resolution No. 129 (August 9, 1921, 67th Congress) in so far as it had been able to prosecute the inquiry; and the Commission alleged in its petition for writ of mandamus that the refusal of the company to permit the access demanded had prevented it from making a complete report in response to the said resolution and that the company hindered and still hinders the Commission from investigating its conduct, management, etc., and from performing its duty to prevent the use of unfair methods of competition in interstate commerce. The material allegations of the petition were supported by affidavits filed therewith.

Between the date of formal demand for access set out above and the filing of the petition for mandamus herein, the Commission issued and served upon the company a formal complaint, charging it with combining and cooperating with members of the Wholesale Tobacco & Cigar Dealers Association of Philadelphia to fix and maintain the price at which the

products of the company should be resold by the jobber purchasers thereof. (Amer. Rec. p. 20.) When the petition herein was filed, the issuance of this complaint was recited therein and made one of the bases of the prayer for access to the records of the company specified therein. Prior to answering the alternative writ the American Company filed with the Commission its answer to said formal complaint and attached a copy of the answer to its answer to the petition for mandamus, and admitted the issuance of the complaint but denied the Commission's right to inspect the documents specified in the prayer of the petition. The prayer of the petition was for an alternative writ of mandamus commanding the company to give access to the records or to appear and show cause why a peremptory writ should not issue commanding them to submit the specified papers for inspection.

The documents and papers to which access was prayed were the same as those specified in the notice and demand previously served on the company. (*Supra*, p. 4.)

The answer filed by the company admitted the material allegations of fact in the Commission's petition.

The company, however, asserted in its answer that it had informed the representative of the Commission that it was willing that the Commission should inspect all of its correspondence with its jobber customers "which in any way relates to the

refusal of the respondent to sell its products to any jobber customers"; meaning, presumably, that it would select and submit to the Commission such correspondence as in its judgment had any bearing upon the investigation.

The answer set up that the demand of the Commission was unauthorized, illegal and unconstitutional as an unreasonable search and seizure within the prohibition of the Fourth Amendment to the Constitution and as wanting in due process of law within the prohibition of the Fifth Amendment.

THE CASE AGAINST THE P. LORILLARD COMPANY.

The facts set out in the pleadings in the case against the Lorillard Company are practically identical with those above recited in the pleadings in the American case with the exceptions noted below. The prayer of the Commission's petition for mandamus against the Lorillard Company specified the following papers to which access was prayed:

> All letters and telegrams received by the P. Lorillard Company, incorporated, from all of its jobber customers located at different points throughout the United States, and also copies of all letters and telegrams sent by said P. Lorillard Company, incorporated, to such jobbers during the period January 1, 1921, to December 31, 1921, inclusive.
>
> All letters and telegrams received by the P. Lorillard Company, incorporated, from all of its sales force or salesmen located in different parts of the United States, and also copies

of all letters and telegrams sent by said P. Lorillard Company, incorporated, to said sales force or salesmen, and also all reports and memoranda made by said sales force or salesmen to the said P. Lorillard Company, incorporated, during the period January 1, 1921, to December 31, 1921, inclusive.

All letters and telegrams received by the P. Lorillard Company, incorporated, from all tobacco jobbers' or wholesale grocers' associations located at different points throughout the United States, and also copies of all letters and telegrams sent by said P. Lorillard Company, incorporated, to said tobacco jobbers' or wholesale grocers' associations during the period January 1, 1921, to December 31, 1921, inclusive.

Any agreements or contracts or arrangements evidenced by any papers, documents, or correspondence between P. Lorillard Company, incorporated, and tobacco jobbers' or wholesale grocers' associations located in different parts of the United States during the period January 1, 1921, to December 31, 1921, inclusive.

All letters and telegrams received by the P. Lorillard Company, Incorporated, during the period January 1, 1921, to December 31, 1921, inclusive, from the following-named corporations, located at different points throughout the United States: The American Tobacco Company, Tobacco Products Corporation, Liggett & Myers Tobacco Company, Scotten-Dillon Company, Bloch Brothers Company, United Cigar Stores Company, American Snuff

> Company, and R. J. Reynolds Tobacco Company, and also copies of all letters and telegrams sent said above-named corporations during the above-named period by the P. Lorillard Company, Incorporated.
>
> All agreements or contracts or understandings evidenced by any papers, documents, or correspondence between the P. Lorillard Company, incorporated, and the American Tobacco Company, Tobacco Products Corporation, Liggett & Myers Tobacco Company, Scotten-Dillon Company, Bloch Brothers Company, United Cigar Stores Company, American Snuff Company, and R. J. Reynolds Tobacco Company during the period January 1, 1921, to December 31, 1921, inclusive, all of the above-named concerns being corporations located at different points throughout the United States. (Lor. Rec. 11.)[2]

With its answer the Lorillard Company filed extensive affidavits in which it set out that the correspondence files to which access was demanded contained correspondence with third parties, its customers, which the company had no right to allow the Commission to inspect without their consent or an order of court. (Lor. Rec. 42.)

The affidavits also contained a statement of the number of letters included in the Commission's demand as follows:

> In subdivision 2 of the notice and demand the commission demands access to and copies of all letters and telegrams received by the

[2] The abbreviation "Lor. Rec." refers to the record in the case against the P. Lorillard Company, Inc., No. 207.

company from all of its sales force throughout the United States, as well as copies of all letters and telegrams sent to them by the company, for the period from January 1st, 1921, to December 31st, 1921. The company receives approximately six hundred (600) letters per week and daily reports from its nine hundred salesmen. This means at least four thousand (4,000) communications per week from its sales force. The company sends approximately six hundred (600) letters per week to its various salesmen, excluding, however, merely routine communications such as circular letters, salary checks, orders, etc.

The Commission's demand, if granted by the court, would cause great inconvenience and large expense to the company during the period of investigation. It would require the entire time of at least three (3) persons familiar with those files for a period of at least a month in order thoroughly to investigate and examine the contents of the filing cabinets which are kept and maintained in the company's executive office. These files are in constant use by the various departments; and if the demand were granted, a great deal of confusion and delay would be caused thereby. During previous investigations by the Federal Trade Commission and the Department of Justice a large portion of the company's correspondence was inaccessible to the employees of the company during the period of such investigation. The amount of expense to the company is practically impossible to determine, but the effect of such investigation

> is to completely demoralize the force connected with any particular department. (Lor. Rec. 52, 53.)

The answer of the Lorillard Company admitted the service of the Commission's complaint, but unlike the answer of the American Company did not attach a copy of its answer thereto.

HOLDING OF THE COURT BELOW.

The court below held:

1. That the Commission is not entitled to inspect such of the correspondence demanded as bears upon intrastate commerce.

2. That the Senate resolution did not confer any power upon the Commission since it did not direct any inquiry (within a authority of Section 6 (*d*) of the Trade Commission Act) relating to any alleged violation of the antitrust laws.

3. That Section 6 (*a*) and 6 (*b*) of the Trade Commission Act confer authority, in the absence of some specific allegation of a violation of law, to gather and compile such information only as may be voluntarily furnished in response to request or demand.

4. Apparently, that where there is a definite complaint charging a specific violation of law, together with a showing of probable cause that the law has been violated, access may be had under the statute.

5. That a corporation is entitled to the guaranties of the Fourth Amendment to the Federal Constitution prohibiting unreasonable searches and seizures in as full a measure as is a natural person.

6. To grant the relief prayed would be to permit an unreasonable search and seizure in violation of the Fourth Amendment.

Detailed assignments of error will be found at pages 48 et seq. of the Record in the case against the American Tobacco Company and at pages 65 et seq. of the Record in the case against the Lorillard Company.

THE QUESTIONS PRESENTED.

Broadly stated, they raise the following questions:

1. Does the Federal Trade Commission act confer authority upon the Commission to inspect such books, papers, and correspondence of corporations engaged in interstate commerce as may be pertinent either to—

(*a*) An investigation instituted, under authority of Section 6 (*a*) of that Act upon its own motion, or directed by resolution of either House of Congress, into the conduct, organization, management, business, or practices of a corporation engaged in interstate commerce; or to

(*b*) An investigation of a charge made to the Commission that a corporation is engaging in the use of unfair methods of competition in violation of Section 5 of the Trade Commission Act; or to

(*c*) An investigation incident to a proceeding under a formal complaint issued by the Commission charging a violation of Section 5 of the Federal Trade Commission Act, for the purpose of securing information with respect to the facts as to the violation of law alleged in the complaint.

2. Does the Federal Trade Commission Act confer authority upon the Commission to inspect the papers and documents specified in the notice and demand (Amer. Rec. p. 19; Lor. Rec. pp. 21, 22) and in the prayers of the petitions herein (Amer. Rec. p. 10; Lor. Rec. pp. 11, 12)?

3. Does Congress possess, and can it constitutionally confer upon the Commission, visitorial power over corporations engaged in interstate commerce to the extent of authorizing an inspection of the books, documents, and correspondence of such corporations for any one of the purposes recited in the paragraph numbered 1 above?

4. Would the inspection prayed for in the petition amount to an unreasonable search and seizure within the prohibition of the Fourth Amendment to the Federal Constitution?

ARGUMENT.

I.

PRELIMINARY CONSIDERATIONS.

1. Power of inspection of documents conferred by the Act limited to papers of corporations.

At the inception of the argument it should be pointed out that the statute purports to confer authority upon the Commission to inspect books, papers, and documents of corporations only—not of natural persons—and that the Tobacco companies are corporations.

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2. The Claire Furnace case distinguished.

It may be well to point out also the distinction between this case and the *Claire Furnace case*, recently argued in this court. That case did not involve an inquiry into a specific violation of law but only i ed the power of the Commission to require corporations to make periodic reports, largely of a statistical character. The primary question involved there was the power of Congress to require the production of information concerning a subject over which it has legislative jurisdiction as a basis of Congressional action, and its authority to empower the Commission to procure such information for it. The instant case, while it involves the power of Congress to procure, through the instrumentality of the Commission, information with respect to the business of corporations engaged in interstate commerce as a basis of legislative consideration, involves also the power of Congress to authorize the Federal Trade Commission to inspect the books, documents, and papers of corporations to ascertain whether the laws it is charged with enforcing are being violated, in particular where there has been a definite charge of a violation of those laws.

There is involved in the cases at bar no question of information respecting costs of production or other information with respect to manufacturing, or regarding profits upon invested capital which was required by the Commission of the Claire Furnace and other steel companies. The information here

sought is concerned with prices and with agreements respecting the resale prices of commodities sold in interstate commerce.

II.

THE FEDERAL TRADE COMMISSION ACT CONFERS AUTHORITY ON THE COMMISSION TO INSPECT THE DOCUMENTS AND CORRESPONDENCE SPECIFIED IN THE PRAYER OF THE PETITION.

1. Provisions of the Trade Commission Act relied upon.

The portions of the Federal Trade Commission Act especially relied upon are as follows:

Sec. 5:

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Sec. 6 (a): That the Commission shall also have power—

> To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

Sec. 6 (d):

Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

Sec. 9:

That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpœnas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to

any corporation or other person, issue an order requiring such corporation or other person to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act, or any order of the Commission made in pursuance thereof.

The words "documentary evidence," used in section 9 above quoted, are defined in section 4 of the Act to mean "all documents, papers, and correspondence in existence at and after the passage of this Act."

It will be observed from the above-quoted provisions of the Act that the Commission is empowered and directed (1) to prevent violations of section 5 of the Act, which prohibits the use of unfair methods of competition in interstate commerce; (2) to investigate upon its own initiative the organization, business, conduct, practices, and management of any corporation engaged in interstate commerce; and (3) at the request of the President or either House of Congress to investigate and report respecting any alleged violation of the antitrust laws. Thus the Commission is authorized to make "investiga-

tions," and to "proceed," in the manner prescribed by the statute, to prevent the use of unfair methods of competition.

2. Right to inspect documents conferred in both "investigations" and in "proceedings" to prevent the use of unfair methods of competition.

Section 9 provides that "for the purposes of this Act the Commission shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being *investigated* or *proceeded* against." The word "investigated" as here used clearly refers back to the investigations expressly authorized by Section 6 (a) and 6 (d). There is no other power conferred by the Act to which the word "investigated" in section 9 could refer, since no other investigations are expressly authorized by the Act. The words "proceeded against" obviously refer to the "proceeding" prescribed by section 5 of the Act to determine whether an unfair method of competition is being used. The disjunctive "or" separates the words "investigated" and "proceeded against" in section 9. It would appear clear, therefore, that the right of access to documentary evidence for purposes of inspection and copying is conferred by the statute in cases of "investigations" authorized by the Act, and in "proceedings" so authorized to determine whether the law is being violated. The House Committee report on the bill shows that this

was the intention of the committee. The following is from the report:

> The power of the Interstate Commerce Commission respecting the compulsory attendance and testimony of witnesses and the production of books and papers has been held in one case to be limited to the quasi judicial duties of the commission to hear complaints against common carriers for violation of the "act to regulate commerce," or to make investigations by the commission upon matters that might have been the object of complaint. (*Harriman* v. *Interstate Commerce Commission*, 211 U. S. p. 243.) In order that the commission may have ample power of subpœna and production of books and papers, the language of section 16 of the bill has been expressly made broad enough to permit the full exercise of that power in connection with any kind of investigation which may be undertaken.
>
> During the consideration of the bill by the subcommittee there was much discussion as to the extent to which the provision of the Constitution contained in the fifth [Fourth] amendment, "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated," might be invoked to protect corporations from an examination of their books and papers. Taking the cases of *Interstate Commerce Commission* v. *Brimson* (154 U. S. 457) and *Hale* v. *Henkel* (201 U. S. 43) as the rule of law, and observing the broad application of that rule in the case of *United*

> *States* v. *Armour & Co.* (142 Fed. Rep. 808), there would seem no doubt that there is ample authority for the constitutional exercise of the full powers of investigation conferred upon the commission.
>
> (Report No. 536, Committee on Interstate and Foreign Commerce, House of Representatives, 63d Cong., 2d Sess.)

The tobacco companies contend that section 9 does not confer upon the Commission any power of access for the purpose of inspecting documents after a formal complaint has been issued by the Commission charging a violation of section 5 of the Trade Commission Act; but that in such case papers and documents may be had only by the use of a subpoena duces tecum. As pointed out above, the access is authorized respecting the documentary evidence of any corporation being "proceeded" against. This word "proceeded" can, in the light of the provisions of the Act, apply to nothing except a contested proceeding before the Commission sitting in its quasi-judicial capacity. Its use in this connection would appear to be decisive of the Commission's contention that inspection may be had after formal complaint charging a violation of law is filed.

An examination of the provisions of section 9 discloses that the first paragraph of the section contains a double grant of power. First, the power to inspect and copy documentary evidence of any corporation being investigated or proceeded against, and second, power to issue subpœnas duces tecum

to compel the attendance of witnesses and the production of documents. The first was an obvious attempt by Congress to exercise its visitorial power over the interstate commerce of corporations engaged in interstate commerce. The second was an attempt to confer upon the Commission the subpœna power, with provision that in case of disobedience application should be made to the courts for enforcement. That this double grant of power was intended is emphasized by the different methods provided for enforcing the powers. A demand for access and inspection is enforceable, under the fourth paragraph of the section, by action through the Attorney General for writs of mandamus. Refusal to obey a subpœna is, under the second and third paragraphs of the section, to be dealt with by the district courts through their power to punish for contempt, and at the instance of the Commission.

A further distinction in the scope and application of the powers is found in the fact that the power of access and examination is applicable only to records of *corporations*, while the Commission's subpœna undoubtedly runs against both corporations and natural persons. Manifestly the powers are separate and distinct, and the issuance of a subpœna is not in all cases prerequisite to inspection and copying of documents, though inspection may be had through its use if desirable.

In *Federal Trade Commission* v. *Baltimore Grain Co.* (284 Fed. 886), Rose, district judge, appears to

have been of the opinion that the statute confers the power of inspection where there is a charge of a violation of law, as well as where there is—

> inquiry into the way the particular corporation itself conducted its business, having as its substantial object the ascertainment of facts concerning that corporation, and as its ultimate end the possibility that in some way such corporate body might be required to mend its ways,

though he was of opinion that access could not be had in a general investigation into conditions existing in an entire industry.

3. Access here prayed was in connection with both an "investigation" under section 6 (a) and with a "proceeding" under section 5.

The right of access for purposes of inspection, prayed for in the cases at bar, was grounded on an investigation under section 6 (a) of the Act, and was also in aid of a previously instituted "proceeding" to determine whether unfair methods of competition were being used. The Commission had, by resolution (Amer. Rec. p. 11; Lor. Rec. p. 13) instituted an investigation to ascertain the facts called for by Senate Resolution No. 129 above referred to. Whether or not the Senate resolution was so worded as to confer any power upon the Commission under section 6 (d) of the Trade Commission Act, the subject matter was such as could be inquired into by the Commission on its own motion under the

authority of section 6 (a) of the Act. This section provides as follows:

> To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

An investigation into the prices paid to producers for tobacco, prices of manufactured tobacco, and the price of leaf tobacco sold for export, by corporations engaged in interstate and foreign commerce, is an investigation into the "conduct" and "business" of such corporations within the meaning of the language of section 6 (a) above quoted.

The Commission's resolution instituting the investigation recited also that on August 27, 1921, a complaint had been lodged with the Commission charging that the tobacco companies were engaged in the use of an unfair method of competition in violation of section 5 of the Trade Commission Act. The petitions for writs of mandamus in these cases also recited that the Commission had issued and served upon the companies complaints charging them with conspiring or cooperating with the members of the Wholesale Tobacco and Cigar Dealers' Association of Philadelphia, Pennsylvania, to fix the prices at which the members of said association and other

jobbers should sell the tobacco products dealt in by them, including the products of the American and Lorillard companies, and, having through combination and conspiracy adopted such resale prices, adopted also in combination with the members of the said association a system for the maintenance and enforcement of such resale prices. (Amer. Rec. p. 20, et seq.; Lor. Rec., p. 24.) This complaint clearly charged the companies with a violation of section 5 of the Trade Commission Act. (*Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441.)

4. The documents and correspondence demanded were of a character and limited to a period pertinent to the inquiry and the charge of a violation of law.

The papers to which access was prayed in the petition against the American Tobacco Company consisted of telegrams and letters passing between the company and its jobber customers, from January 1, 1921, to December 31, 1921. (Amer. Rec. p. 10.) In the *Lorillard case*, the papers to which access was prayed included the telegrams and letters passing between the company and its jobber customers for the same period, correspondence between the company and its sales force, reports and memoranda made by the sales force to the company for the same period, correspondence passing between the company and all tobacco jobbers' and wholesale grocers' associations, as well as all agreements, contracts, or arrangements between the company and such tobacco

jobbers' and wholesale grocers' associations for the same period, all correspondence, including telegrams, as well as all agreements or contracts or understandings evidenced by any papers, documents, or correspondence between the company and eight named companies.

The conspiracy or combination alleged in the complaint to have been formed was between the tobacco companies and the members of the Wholesale Tobacco Jobbers' Association. Clearly, therefore, if there was evidence in the correspondence or contracts of the companies tending to sustain the charges of the complaint, it would have been found in the correspondence or contracts existing between the tobacco companies and the members of the jobbers' associations.

It was contended below that the period covered by the demand and by the prayer of the petition, i. e., January, 1921, to December, 1921, was not that covered by the charge of the complaint, and that the papers to which access was requested could not therefore be relevant. But the complaint charged that the conspiracy or combination was entered into in 1920. The offense charged was evidently of a continuing nature. Men do not combine to fix and maintain resale prices upon products for a day or for a week, but the prices once fixed are to be maintained until changes are agreed upon. Furthermore, the complaints charged that—

> acts and things done by respondents, * * * had and *still have* the tendency and capacity

> to constrain all wholesale dealers doing business in the territory above mentioned to uniformly sell the aforesaid products to their dealer customers at the prices fixed by the association and its members as hereinbefore set out, and hence to hinder and suppress all competition in the wholesaling of said products in said territory, and particularly among the members of the association, and, further, to hinder and restrict competition between all retail dealers in said territory. Respondents' said practices thus tended and *still tend* to unduly hinder and obstruct the free and natural flow of commerce in the channels of interstate commerce. (Amer. Rec. p. 26; Lor. Rec. p. 29.)

The charge was clearly, therefore, of a continuing conspiracy or combination entered into in 1920, and still in force and effect at the date of the issuance of the complaint (May 31, 1922). If, therefore, evidence of the continuation and effectuation of the conspiracy, where and how it was being carried out, and what its effect upon competition was, was to be found in the correspondence and other documents of the tobacco companies, it would be discovered in the period January, 1921, to December, 1921, the months immediately following the formation of the combination. The papers to which access was prayed, therefore, covered the very period in which evidence of the offense charged would naturally be found.

The fact that the correspondence and contracts called for included those with tobacco jobbers and

wholesale grocers other than those named in the formal complaint is not fatal, in view of the fact that the preliminary report of the Commission, in response to Senate Resolution No. 129, supra (Senate Document No. 121, 67th Cong., 2d Sess.), of which this court may take judicial notice, discloses probable cause to believe that the tobacco companies were combining with jobbers' associations in various sections of the country to fix and maintain resale prices on products purchased by the jobbers from the tobacco companies. The correspondence and documents called for were those wherein would be found evidence of this widespread combination and conspiracy by the companies, if it existed, as the facts already in hand tended to prove.

5. Objection that correspondence connected with intrastate transactions can not be had, not sound.

The companies make the point in their answers that much of the correspondence to which access was prayed concerned sales by the companies to customers within the same state in which their factories were located, and, therefore, pertained only to intrastate commerce. This contention overlooks the fact that the customers are parties defendant to the Commission's complaint, that they are engaged in interstate commerce, and that letters from the tobacco companies to such customers may, and unless expressly limited to intrastate business of the customers, undoubtedly do refer to their interstate business as well.

The American Company goes further and asserts that some of the correspondence called for concerned not only the intrastate business of that company, but the intrastate business of its customers as well, and contends there can be no power in the Federal Government to inspect such correspondence. This contention fails to take into account that the Commission's complaint charges a combination to fix the resale prices on all the products of the tobacco companies sold by the jobbers, and that the combination covers therefore sales in interstate as well as intrastate commerce. Correspondence between the parties with respect to the combination would undoubtedly apply to the combination as a whole and would be relevant and material evidence with respect to the interstate feature of the combination.

It may be added that no one has probably ever heard of an agreement among jobbers expressly limited to the maintenance of resale prices in interstate commerce only. If wholesale dealers were to sell in intrastate commerce a substantial percentage of the products of the tobacco companies at less than the resale prices fixed for such sales in interstate commerce, such policy would render abortive any attempt to maintain prices in interstate commerce.

6. No privilege attaches to correspondence between a corporation engaged in interstate commerce and its customers written in the ordinary course of business.

The primary objection of the Lorillard Company is that the Commission's demand and the prayer of

the petition in the case is for access to correspondence with its customers which it appears to regard as in some way privileged. The correspondence called for being with jobbers or wholesale grocers purchasing from the companies, obviously does not fall within any class of privileged communications known to the law of evidence, such as correspondence between attorney and client, physician and patient, etc. No decision is cited, nor can any be found, which holds communications between a manufacturer and his jobber customers to be privileged. The mere fact that papers called for may concern other parties is no ground for not producing them. This court, in *Interstate Commerce Commission* v. *Baird* (194 U. S. 25, 46), said:

> Nor can we see force in the suggestion that these contracts were made with persons not parties to the proceeding. Undoubtedly the court should protect nonlitigants from unnecessary exposure of their business affairs and papers. But it certainly can be no valid objection to the admission of testimony otherwise relevant and competent, that a third person is interested in it.

III.

CONGRESS IS VESTED WITH VISITORIAL POWER OVER CORPORATIONS WITHIN THE FIELD COMMITTED TO ITS JURISDICTION AND MAY CONSTITUTIONALLY CONFER AUTHORITY ON EXECUTIVE OFFICERS AND ADMINISTRATIVE BODIES TO EXERCISE SUCH POWER TO ENFORCE LAWS WHICH THEY ARE REQUIRED TO ADMINISTER.

The obvious purpose of Congress in enacting the first clause of section 9 of the Trade Commission Act

was to exercise its visitorial power over corporations engaged in interstate commerce by conferring power of visitation and inspection upon the Commission "for the purposes of this act," but for those purposes only. (See Report No. 533, Committee on Interstate Commerce, 63d Cong., 2d Sess.) The purposes of the act in so far as they are in any wise involved in these cases are, to make investigations into the conduct, organization, management, business, and practices of corporations engaged in interstate commerce and to report the facts to Congress; at the request of the President or either House of Congress to investigate and report respecting any alleged violation of the antitrust laws; and to prevent persons, partnerships, and corporations from using unfair methods of competition in violation of section 5 of the Trade Commission Act.

1. Nature and extent of the visitorial power.

The visitorial power of the state clearly includes the authority to inspect the books, papers, and documents of corporations for the bona fide purpose of ascertaining whether its laws are being observed. Indeed, the essence of visitorial power appears to be the power resting in the sovereign to ascertain whether corporations created by it, or doing business within its borders by its consent, are exceeding their charter powers or are violating the general laws of the state applicable to such corporations.

This court said in *Hale* v. *Henkel* (201 U. S. 43):

> The General Government possesses the same right to see that its own laws are respected as

> the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress.

What, then, is the visitorial power of the State and of the Federal Government in the field committed to it? This court in *Guthrie* v. *Harkness* (199 U. S. 148, 158) said:

> The origin and nature of "visitorial" power received full discussion in the case cited by Bouvier from 4 Wheaton. See opinion of Mr. Justice Story in *Dartmouth College case*, 4 Wheat. 673.
>
> The meaning of this section was before Judge Baxter in the case of *First Nat. Bank of Youngstown* v. *Hughes*, 6 Fed. Rep. 737, and of the meaning of the term "visitorial powers," as used in section 5241, that learned judge said:
>
> "Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business and enforce an observance of its laws and regulations. Burrill defines the word to mean 'inspection; superintendence; direction; regulation.'"
>
> At common law the right of visitation was exercised by the King as to civil corporations and as to eleemosynary ones by the founder or donor. 1 Cooley's Blackstone, 481. "In the United States the legislature is the visitor

of all corporations created by it, where there is no individual founder or donor, and may direct judicial proceedings against such corporations for such abuses or neglects as would at common law cause forfeiture of their charters." 1 Cooley's Blackstone, 482, note.

In the case before us the Supreme Court of Utah quotes from Merrill on Mandamus as follows:

"Visitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings. In America there are very few corporations which have private visitors, and in the absence of such, the State is the visitor of all corporations."

* * * * *

The right of visitation being a public right, existing in the State for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers, Congress had in mind in passing this section (Sec. 5241, Rev. Stat., Natl. Banking Act) that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him, and, authorizing the appointment of a receiver, to take possession of the business with a view to winding up the affairs of the bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that no State law or enactment should undertake to exercise the right of visitation over a national corporation. * * *

Again, in *Hale* v. *Henkel*, supra, it is said (p. 74):

> Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and to find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. * * *

And in *Wilson* v. *U. S.* (221 U. S. 361, 382):

> What then is the status of the books and papers of a corporation which has not been created as a mere instrumentality of government, but has been formed pursuant to a voluntary agreement, and hence is called a private corporation? They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection, or must be kept or filed in a special manner. They have reference to business transacted

> for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It can not resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitorial power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress.

The general principles are thus stated by Thompson on Corporations:

> Visitation of a corporation means the examination of its affairs and the person authorized to make the examination. The purpose is to supervise, direct, and control the management of the corporation. The state exercises its right to visitorial power over corporations in order to protect the public from monopolies, unlawful combinations, and from unreasonable exactions, and this power is exercised in

> proper cases through the medium of the courts, or commissions created by the state. The visitorial power must be specifically conferred. (Thomp. on Corp., 2d Edition, 1922, Cumulative Sup.. Sec. 475.)

The author of the article on Corporations in Ruling Case Law (vol. 7, p. 611) says:

> In England the King, being the sole founder of all civil corporations, was constituted the visitor of all such corporations; in this country the visitorial power over corporations existing under and by virtue of the laws of a state vests in the state, and as to those formed under an act of Congress, it vests in the general government, and is exercised through the medium of the courts, *or by visitors appointed for that purpose by or in pursuance of statutes.* The state, by its authorized officers, has the undoubted right to require full information as to all of the business of the private corporations created by it or which it has permitted to come into the state, for the state has the right to know what its creature or one of another sovereignty which it permits to come into the state is doing.

a. Statutes empowering executive officers or administrative bodies to inspect books, documents, and papers of corporations to ascertain whether laws administered by them are being violated are upheld.

Statutes, both state and federal, authorizing executive officers or administrative bodies to inspect the books, papers, and documents of quasi-public corporations to ascertain whether the laws which such officials are charged with enforcing are being violated,

have been in existence for some years and have been frequently upheld. The Act to Regulate Commerce as amended by the Act of 1906 provides that the Interstate Commerce Commission shall at all times have access to and an opportunity to examine the accounts, records, and memoranda kept by common carriers subject to the act. This provision was construed and upheld by this court in *U. S.* v. *Louisville & Nashville R. R. Co.* (236 U. S. 318). Provisions for inspection are found in the acts creating and enlarging the powers of the Tariff Commission;[3] the act creating the Railroad Labor Board;[4] the National Tax laws;[5] the act creating the Federal Coal Commission;[6] and in acts of Congress incorporating railroad companies. (See the decision of this court in

[3] "Any member of the Commission, officer, or employee thereof, duly authorized in writing by the Commission, shall, at all reasonable times for the purpose of examination, have access to and the right to copy, any book, account, record, paper, or correspondence relating to any matter which the Commission is authorized by this act to investigate." (42 Stat. 1024.)

[4] "When necessary to the efficient administration of the functions vested in the Labor Board by this title, any member, officer, employe, or agent thereof, duly authorized in writing by the board, shall, at all reasonable times for the purpose of examination, have access to and the right to copy, any book, account, record, paper or correspondence relating to any matter which the board is authorized to consider or investigate." (41 Stat. 456, 472 (sec. 311–a.)

[5] "That the commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records or memoranda bearing upon the matters required to be included in the return." (42 Stat. 227, 310.)

[6] "Any member of the Commission, officer, or employee thereof, duly authorized in writing by the Commission, shall, at all reasonable times for the purpose of examination, have access to and the right to copy any book, account, record, paper, or correspondence relating to any matter which the Commission is authorized by this act to investigate." (42 Stat. 1024.)

United States v. *Union Pacific Railroad Co.*, 98 U. S. 569, 613, 616.)

Laws empowering State public utility commissions to inspect the books, papers, and documents of corporations subject to their jurisdiction obtain in a number of States. (Pennsylvania Public Service Law, 1914, Pa. Stats. 1920, sec. 18146; Nebraska Compiled Stats. 1922, sec. 5481; Montana Revised Code 1921, sec. 3887; Michigan Compiled Laws, Annotated Supplement, 1922, sec. 8164(6); Indiana, Burns' Annotated Stats. Revision 1914, sec. 10052 Z1; Washington, Pierce's Code 1921, sec. 5604; Arkansas, Crawford and Moses Digest of Stats. 1921, sec. 1625; Maine, Revised Stats. 1916, chap. 55, sec. 5; Wisconsin Stats. 1921, sec. 1797–18; ibid., sec. 1797m–14; Ohio, Code 1920, sec. 499–8.) The provisions of these statutes appear to be generally acquiesced in, and have been specifically upheld. (*Federal Mining & Smelting Co.* v. *Pub. Utility Commission*, 26 Idaho 391, 43 Pac. 1173.)

In *Federal Trade Commission* v. *Baltimore Grain Co.*, *supra*, Judge Rose, of the United States District Court for the District of Maryland, held that where there was an alleged violation of any law which the Trade Commission was charged with enforcing, an inspection of the books, papers, and documents could be had.

b. **The visitorial power extends to correspondence files.**

The tobacco companies strongly urge that the visitorial power does not extend to letters passing between them and their customers, and the fact that

this court held in the *Louisville & Nashville case, supra*, that correspondence files were not included within the statute is pointed to as perhaps holding that access can not be had to these papers.

Excluding correspondence between attorney and client, physician and patient, and other communications recognized as privileged under the rules of evidence, there would appear upon mature consideration to be no more persuasive reason for exempting correspondence between an industrial corporation and those to whom it sells than there is for exempting other corporate records. Correspondence between such a corporation and its customers probably very rarely contains any information peculiarly confidential so far as the seller is concerned. Such letters are, it is submitted, not nearly so liable to contain confidential information as, for instance, are the minutes of directors' meetings. In the latter would naturally be found information respecting many vital matters, such as the general policy of the company, its plans for developing markets, new products to be manufactured and sold—in short, matters of the most confidential and secret nature which it would desire to guard with great care. The books of account also disclose costs, profits, and similar data. Information respecting these vital subjects of internal management would never be found in the correspondence of the company with customers. And yet, in so far at least as quasi-public corporations are concerned, access to books of account and corporate records, such as minutes of directors' meetings, may be had.

The impression that correspondence contains peculiarly confidential matter and that it is therefore sacred doubtless arises out of the natural association of the word "correspondence" with the letters of natural persons, which undoubtedly frequently pertain to matters of the most personal and sacred nature. When one stops to consider, however, it is obvious that correspondence of a business corporation with its customers does not contain information of this intimate character, and there is no more reason for excluding it from the visitorial power than there is for excluding other corporate records.

c. **The Harriman case distinguished.**

The tobacco companies relied strongly in the court below upon the case of *Harriman* v. *Interstate Commerce Commission* (211 U. S. 407). The decision in that case is in no wise contrary to the Commission's contention in the preceding pages respecting the extent of the visitorial power of Congress over *corporations* engaged in interstate commerce. In the Harriman case the court expressly recognized and pointed out that it was dealing only with the power of the Interstate Commerce Commission under the act to compel natural persons, as distinguished from corporations, to divulge private matters. This would appear to be made clear from the following excerpt from that opinion:

> We could not believe on the strength of other than explicit and unmistakable words that such autocratic power was given for any less

> specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that *personal* matters should be revealed. * * *
>
> The Commission may require certain other reports, and is to have access to all accounts, records, and memoranda. The section now deals at length with this matter and how accounts shall be kept and the like. It seems to us plain that it is directed solely to accounts and returns, and is imposing a duty on the *common carrier* only from whom the returns come.
>
> All that we are considering is the power under the act to regulate commerce and its amendments to extort evidence from a *witness* by compulsion. What reports or investigations the commission may make without that aid but with the help of such returns or special reports as it may require from the *carrier*, we need not decide.

A further distinction between the Harriman case and the cases at bar is that in the latter there are distinct and specific allegations of violations of law. The court in the Harriman case appeared to be of the impression that even the natural person, Harriman, might have been compelled to answer the questions if they had been relevant to any alleged violation of law, or to a subject-matter which might have been made the object of complaint.

> We are of opinion on the contrary that the the purposes of the act for which the commission may exact evidence embrace only com-

plaints for violation of the act, and investigations by the commission upon matters that might have been made the object of complaint.

Finally, the Harriman case turned upon a question of statutory construction only, and decided nothing except that the Act to Regulate Commerce, as at that time worded, did not authorize the Commission to require a natural person to disclose intimate, personal matters in a general inquiry into the relation of various railroads to each other, but which did not involve any violation of law.

d. **Visitorial power applies with equal force to private corporations and corporations in quasi-public business.**

It may be said that the statutes and decisions referred to, in so far as they have been specifically upheld, apply to quasi-public corporations only; and it was urged below that the state has a greater right to know whether corporations engaged in business affected with a public interest are violating its laws than it has to have the same information with respect to private corporations. It is freely conceded, of course, that the right of either the State, or of the Federal Government acting under the commerce clause, to impose regulations upon the business of quasi-public corporations, differs widely from its right in that regard as respects private corporations. In the case of the former, rates may be fixed by the government through administrative bodies and the corporation may be subjected to other drastic forms of regulation which may not be applied to private

corporations. But Congress, acting under the commerce clause, and the States under their police power, may regulate to some extent the business of private corporations. State and Federal anti trust laws, the Clayton Act, and Section 5 of the Trade Commission Act are examples of such valid regulations. And we do not perceive how there can be any difference in the right of the State to ascertain whether admittedly constitutional regulations applicable to private corporations are being violated and its right to know whether the laws applicable to quasi-public corporations are being observed.

In *Consolidated Rendering Co.* v. *Vermont* (207 U. S. 541) and *Hammond Packing Co.* v. *Arkansas* (212 U. S. 322), where orders to produce papers and books of corporations very broad in their scope were upheld under the visitorial power of the State over corporations, the corporations were engaged in private as distinguished from quasi-public business. In the *Hammond case* the provisions of the State antitrust law with respect to the production of books and papers were very comprehensive, but this court appears to have found no difficulty in sustaining the statute, or the order, under the visitorial power of the State. State courts have sustained similar provisions in other statutes. (*People* v. *American Ice Co.*, 54 N. Y. Misc. Rep. 67.)

In *U. S.* v. *Union Pacific R. R. Co.* (98 U. S. 569) this court points out at some length (613, 616) the powers which the Federal Government may exercise over the affairs of corporations of its own creation

and emphasizes the fact that the power reserved in the charter of the railroad company to inspect its books and correspondence through the Secretary of the Treasury is far more effective than a bill of discovery.

c. Visitorial power of the Government over corporations not the same as subpoena power or the power to grant a bill of discovery.

The visitorial power of the Government over corporations is to be distinguished from the power of the courts to require the production of documentary evidence in a pending cause by subpoena duces tecum, or the right of a litigant to a bill of discovery, and is a broader power than either. The subpoena duces tecum was originally a writ, issuing out of a court of law, requiring a witness to appear and produce documents tending to elucidate the issues in the cause. On proof of service upon the witness and that the evidence is material, a judgment may issue against him for contempt if he neglects to attend to this command. The power of the court by subpoenas duces tecum to compel the production of documentary evidence tending to prove issues in a litigated matter applies as well to natural persons as to corporations, and can be invoked as well on behalf of a private litigant as on behalf of the agencies of government. The same is true of the power of the court to entertain a bill of discovery.

In the closing sentence of its brief below the American Company says:

> When an officer or agent of the American Tobacco Company is under subpœna duces

> tecum to produce certain described papers and the court has held that a proceeding is pending in which it is proper for the court to subpœna these particular papers and when the court issues an order to that effect, then and in that event only can respondent be required to submit these particular items of "documentary evidence" (and no others) to be "examined and copied."

This is but a statement of the conditions under which a litigant, either a private party or the Government, may obtain the production of papers at the hands of a corporation, or natural person, in a pending civil cause. The visitorial power of the state over corporations certainly comprehends something more than the right to have competent and relevant evidence produced in the trial of a case. (*Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541.)

A decision which illustrates the difference between the power of a state public utilities commission to inspect books, papers, and documents of corporations, and the proper practice of such a body when sitting in its quasi-judicial capacity, is that of the Supreme Court of Idaho in *Federal Mining & Smelting Co.* v. *Public Utilities Commission* (26 Idaho 391, 43 Pac. 1173). There the court holds that the Public Utilities Commission is authorized by the statute to inspect the books, papers, and documents of corporations subject to its jurisdiction whenever it appears to the Commission desirable, but that

where a third party complains to the Commission of the rates of a public utilities company, and a contested proceeding is being heard before the Commission, the Commission will see to it that the defendant is only required to produce such books, papers, and documents as are relevant and material to the issues in the particular proceeding. So in the Federal Trade Commission Act, we contend, Congress sought to confer upon the Commission power to examine books, papers, and correspondence within the limited field of the jurisdiction granted, as well as power to compel the production of relevant material and documentary evidence in a contested proceeding.

2. The power of inspection to ascertain whether there are violations of law, conferred on the Commission by Section 9, valid within the foregoing decisions and principles.

The power of inspection conferred on the Commission by Section 9 of the Federal Trade Commission Act is clearly constitutional and valid. The right of access is limited to its use "for the purposes of this Act." As pointed out above (*supra*, p. 17), one of the purposes is to see that the prohibition of the statute against the use of unfair methods of competition is not violated. Another is to investigate, at the request of the President or either House of Congress and to report the facts with respect to any alleged violations of the antitrust laws. These two purposes both fall directly within the visitorial powers as defined by the courts; and Congress, through the Commission, has the right to ascertain whether the laws

are being violated. As is shown above, there can be no question in this case of the existence of a definite and specific charge of a violation of the laws which the Commission is charged with enforcing.

Whether the visitorial power includes the right of access for purposes of inspection as an aid to an investigation into industrial conditions, pursuant to a definite direction by Senate resolution, will be now briefly considered.

3. Power committed to the Commission to inspect documents in connection with investigations authorized by section 6 (a) as a basis of reports to Congress is constitutional.

The power of Congress to compel witnesses to testify and to produce documents with respect to subjects over which Congress has legislative jurisdiction has been so recently before this court, in the case of *Federal Trade Commission* against *Claire Furnace Co.* (No. 250 of the present term), that it appears unnecessary to do more than state the points made by the Government in that case, and to invite attention to the additional points involved in the instant case.

It was there contended (1) that as an indispensable incident to its power to legislate Congress had power to ascertain the facts respecting any subject committed to its legislative jurisdiction (*McCulloch* v. *Maryland*, 4 Wheat. 315; *Legal Tender Cases*, 110 U. S. 421; 12 Wall. 457, 536; *In re Chapman*, 166 U. S. 661; *Interstate Commerce Commission* v. *Brim-*

son, 154 U. S. 447, 476; *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33; *McDonald* v. *Keeler*, 99 N. Y. 463; *People* v. *Sharp*, 107 N. Y. 427; *People ex rel. Bender* v. *Milliken*, 185 N. Y. 35; *Sheppard* v. *Bryant*, 191 Mass. 591; 9 A. L. R. 1341); (2) that Congress could constitutionally authorize an administrative body to compel the production of facts concerning any subject over which Congress had jurisdiction, for the reason (*a*) that the power to collect information is not legislative power and may be delegated (Watson on the Constitution, p. 114; *Burton* v. *United States*, 202 U. S. 344, 367; *Wayman* v. *Southard*, 10 Wheat. 1, 42, 43; *I. C. C.* v. *Goodrich Transit Co.*, 224 U. S. 194; *People ex rel. Bender* v. *Milliken*, 185 N. Y. 35); (*b*) that the Act lays down a sufficiently definite rule for the guidance of the Commission (*Field* v. *Clark*, 143 U. S. 649; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Buttfield* v. *Stranahan*, 192 U. S. 470; *United States* v. *Grimaud*, 220 U. S. 506); (*c*) that it is a proper and constitutional means for carrying into execution the legislative power of Congress (*McCulloch* v. *Maryland*, 4 Wheat. 315, 421; *Legal Tender Cases*, 110 U. S. 421, 440; *United States* v. *Fisher*, 2 Cranch, 358, 396; *First National Bank* v. *Union Trust Co.*, 244 U. S. 416, 424); and (3) that the information specified in the reports there required of corporations did pertain to subjects committed to the jurisdiction of Congress.

This phase of the case at bar involves directly one point not involved in the Claire Furnace case, viz, May Congress, in authorizing the Commission to investigate the conduct, management, etc., of corporations engaged in interstate commerce, and to make report of the facts to it, confer upon the Commission authority to inspect the books, papers, documents, and correspondence of such corporations for the purpose of ascertaining facts pertaining to an authorized inquiry?

The authorities above cited (*supra*, pp. 46–47) establish the power of Congress itself to compel the production, by proper process, of books and papers on pain of fine and imprisonment. If natural persons may be summoned to appear and produce books, documents, and papers for inspection of either House of Congress, or of its committees when duly authorized by either House, it would appear competent for a committee, so authorized, to visit the offices of persons and demand an inspection of relevant books and papers. It would appear, for reasons hereinafter set out (*infra*, pp. 49–56), that this power may be exercised at least with respect to corporations because of the superior power of the State over corporations as distinguished from natural persons. The superiority of this method over that of requiring the production of books and papers at distant points is clear.

IV.

TO PERMIT THE INSPECTION PRAYED IN THE COMMISSION'S PETITIONS WOULD NOT VIOLATE THE FOURTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The tobacco companies contend that to permit the inspection prayed would amount to an unreasonable search and seizure within the Fourth Amendment to the Federal Constitution.

1. Corporations not entitled to as full a measure of protection under the Fourth Amendment as natural persons.

The court below clearly erred in holding that "a corporation is entitled to invoke the guaranties of the Fourth Amendment against unreasonable searches and seizures in as full a measure as would a person or partnership." The decision of this court in *Essgee Company* v. *United States* (262 U. S. 152) definitely settles the question that the immunity of corporations under the Fourth Amendment is not the same as that of natural persons. The court says:

> Such corporations do not enjoy the same immunity that individuals have, under the Fourth and Fifth amendments, from being compelled by due and lawful process to produce them [books and papers] for examination by the State or Federal Government.

2. Extent of protection afforded.

What, then, is the protection of a corporation under the Fourth Amendment? This court said in *Wilson* v. *United States* (221 U. S. 361, 382):

> It (the corporation) can not resist production on the ground of self-crimination. Al-

> though the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made.

Unlike a natural person, then, a corporation may be compelled to produce its books and papers to convict it of violations of penal statutes or to inflict forfeiture. The objection that the result will tend to inflict penalties and forfeitures may therefore no longer be urged.

This court holds, however, that a corporation is entitled to some protection under this amendment. It is entitled presumably not to have its offices denuded of records to an extent which will render it difficult, if not impossible, to conduct its business. In *Hale* v. *Henkel*, *supra*, this court said (p. 77):

> If the writ had required the production of all the books, papers, and documents found in the offices of MacAndrews & Forbes Company, it would scarcely be more universal in its operation, or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpœna.

But the procedure for inspection provided by the Trade Commission Act effectually avoids the inconvenience and possible financial loss due to the removal of books and papers from the offices of the corporation.

Corporations are also entitled under the amendment not to have their offices broken open and their papers seized and carried away without warrant of law (*Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385); but certainly no charge of this character can be made in the cases at bar; nor can conduct of this sort ever be justified under authority of the Trade Commission Act.

3. "Probable cause," "specific charge," or "materiality" need not be proven as a condition precedent to the exercise of the visitorial power.

The court below was of opinion that no inspection can be had under authority of the Federal Trade Commission Act until probable cause to believe that evidence of a violation of law will be found in the files of the corporation has been shown and until the materiality to such violation of the law of the particular books and papers required is made to appear.

The decisions of this court do not sustain the court below in this holding. In *Hale* v. *Henkel*, *supra*, this court held that probable cause to believe that a violation of law had been committed need not be shown as a condition precedent to compelling the production of corporate documents and papers before

the grand jury and that no specific charge of a violation of law need be formulated in such case. In *Wilson* v. *United States, supra,* this court said:

> The objections to the jurisdiction [of the grand jury] on the ground that there was no "cause" or "specific charge" pending before the grand jury were made and answered in *Hale* v. *Henkel,* 201 U. S. 43, and require no further examination. (201 U. S. 372.)

With respect to the question of materiality of the testimony required before the grand jury, Mr. Justice McKenna in his concurring opinion in *Hale* v. *Henkel, supra,* said:

> The materiality of his testimony is not open to a witness to determine, and the order of proof is for the court. Besides, if a grand jury may investigate without specific charge, may investigate upon the suggestion of one of its members, must it demonstrate the materiality of every piece of testimony it calls for before it can require the testimony? So limit the power of the grand jury and you may make it impotent in cases where it needs power most and in which its function can best be exercised. (201 U. S. 81).

The language of Mr. Justice McKenna with respect to the function of the grand jury is directly applicable to the function of the Federal Trade Commission in ascertaining whether the statutes it is charged with enforcing have been violated.

But if a specific charge must be formulated and probable cause made to appear before an examina-

tion can be had under the Federal Trade Act, both conditions have been fully met in the cases at bar. A specific charge of a violation of law was set forth in the notice and demand and especially in the formal complaint which the Commission filed. Probable cause to believe that evidence would be found material to this charge was amply shown in the Commission's preliminary report in response to Senate Resolution 129. (Senate Doc. No. 121, 67th Congress, 2d Session.)

4. The Notice and Demand was sufficiently specific even under the tests applied to subpœnas duces tecum.

The companies contend that any demand made under the power of inspection must describe with particularity the papers sought to be inspected, and specify the particular papers. This contention has not been upheld by this court where subpœnas duces tecum or orders to produce under the visitorial power of the State have been involved. In *Consolidated Rendering Co.* v. *Vermont* (207 U. S. 541, 554) this court said:

> But unless it can be said that the court or grand jury never has any right to call for all the books and papers, or correspondence, between certain dates and certain persons named, in regard to a complaint which is pending before such court or grand jury, we think the objection here made is not well founded.
>
> We see no reason why all such books, papers, and correspondence which related to the sub-

> ject of inquiry and were described with reasonable detail, should not be called for and the company directed to produce them. *Otherwise the State would be compelled to designate each particular paper which is desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have.*

In this decision the court recognizes the impossibility of the State describing in advance and with particularity the papers desired.

The prayer of either of the petitions in the cases at bar was not so broad and general as the order of production which the court sustained in the *Consolidated Rendering Co. case, supra*, and in the case of *Hammond Packing Co.* v. *Arkansas* (212 U. S. 322). In the former, the notice called for all books and papers relating to, or concerning, any dealings or business between January 1, 1904, and the date of the notice, October 1906. In the latter, the order called for "any books, papers and documents in the possession or under the control or authority of said persons relating to the merits of said cause or to any defenses therein." In the *Wheeler case* (226 U. S. 478) the order to produce before the grand jury called for—

> All the cash books, ledgers, journals and other books of account of the company, and all copies of letters and telegrams of Wheeler & Shaw, Incorporated, whether signed or purporting to be signed by the corporation or by its president or treasurer in its behalf,

for and covering the period from October 1, 1909, to January 1, 1911.

5. All lawful requisites were complied with in the demands.

In conclusion we quote from *Wilson* v. *United States* supra (p. 382):

> That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse.

It has to submit its books and papers only to "duly constituted authority when demand is suitably made."

The demand in the cases at bar are made under express authority of a law of Congress. It was as specific as it could under the circumstances of the case be made, and was sufficiently definite within the decisions quoted above. The court below should have issued peremptory writs of mandamus as prayed for.

6. The companies can not assert any constitutional privilege on behalf of their customers.

Nor can the companies assert any constitutional privilege on behalf of their customers. In *Hale* v. *Henkel* (201 U. S. 43, 69) this court said:

> The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead

the fact that some third person might be incriminated by his testimony, even though he was the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or corporation.

The judgment of the District Court should be reversed.

JAMES M. BECK,
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W. H. FULLER,
Chief Counsel, Federal Trade Commission,
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Attorneys for the Federal Trade Commission.

FEBRUARY, 1924.

○

Jas. A. Fowler,
Special Assistant to the
Attorney General.

MAR 4 1924
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923—No. 206.

FEDERAL TRADE COMMISSION,
Plaintiff-in-Error,

—against—

AMERICAN TOBACCO COMPANY,
Defendant-in-Error.

BRIEF FOR AMERICAN TOBACCO COMPANY.

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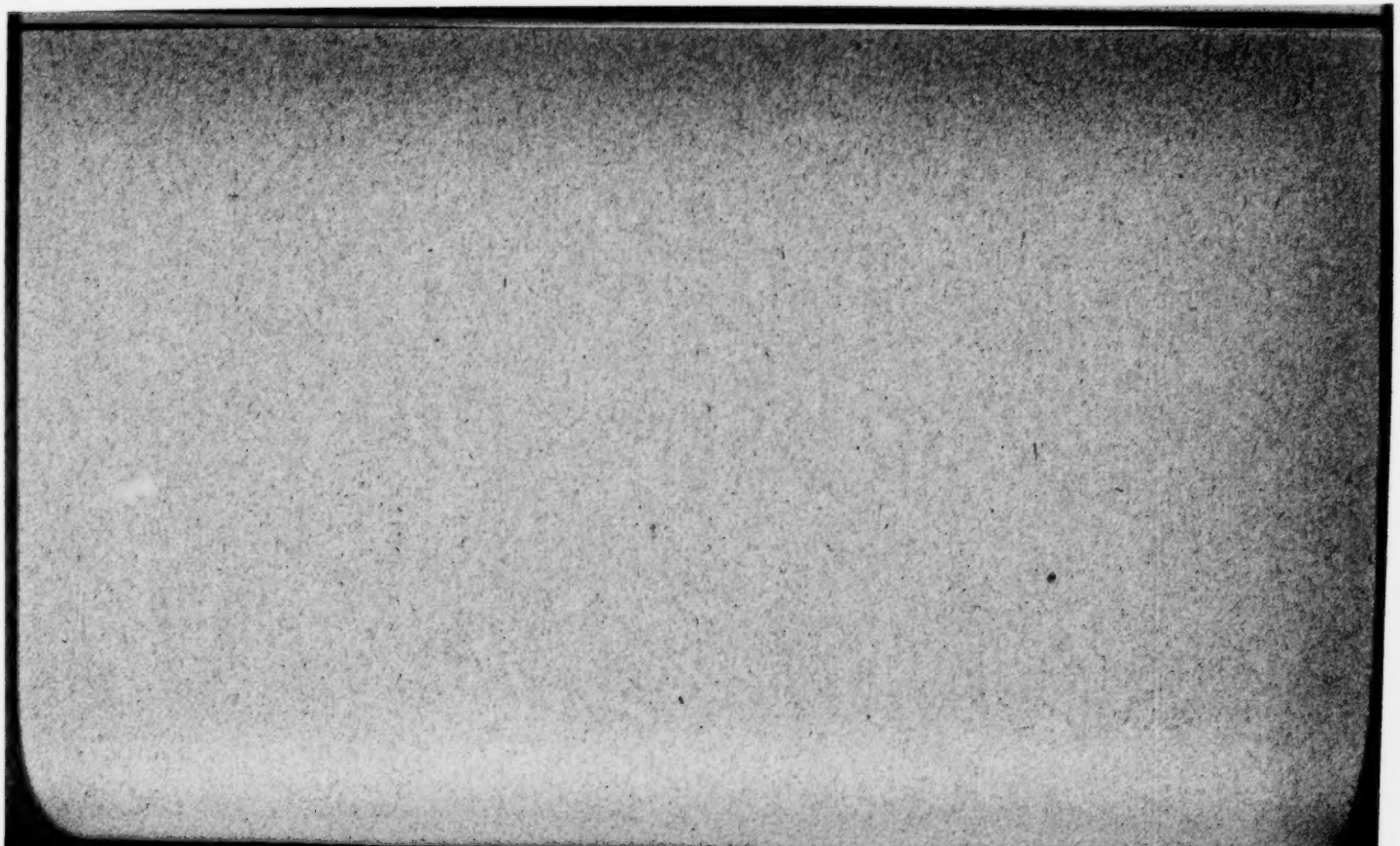

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923—No. 206.

FEDERAL TRADE COMMISSION,
Plaintiff-in-Error,

—against—

AMERICAN TOBACCO COMPANY,
Defendant-in-Error.

BRIEF FOR AMERICAN TOBACCO COMPANY.

Introduction.

This is a writ of error obtained by Federal Trade Commission, petitioner below, from a judgment of the District Court, Southern District of New York, entered October 9, 1922, that denied, upon the merits, the application of petitioner for a peremptory writ of mandamus. The judgment was entered by United States Circuit Judge Manton sitting as District Judge upon an opinion, in this case and in a very similar case of Federal Trade Commission against P. Lorillard Company, which opinion was rendered on October 3, 1922 (*Record*, pp. 37-45).

The petition for the writ of mandamus sought the compulsory production by American Tobacco Company "for examination and inspection and for the purposes of copying same" by Federal Trade Commission, of "all letters and telegrams received by American Tobacco Company from all of its jobber customers located at different points throughout the United States, and also copies of all letters and telegrams sent by American Tobacco Company to such jobbers during the period January 1, 1921, to December 31, 1921, inclusive." The petition with its exhibits appears in the record at pages 5-27. The exhibits to the petition show that the papers sought thereby to be produced for examination and inspection were the last and only documents, papers and correspondence of, or in the possession of, American Tobacco Company not already made available to Federal Trade Commission by American Tobacco Company: Exhibit C to petition (*Record*, p. 13) shows that on October 17, 1921, a notice and demand was served on American Tobacco Company in which Federal Trade Commission demanded "an opportunity to examine all documentary evidence, including all documents, papers and correspondence in your (American Tobacco Company's) custody or under your control in order that copies may be made of such portions of such documentary evidence as may be deemed relevant"; counsel for American Tobacco Company wrote in answer to this notice and demand stating the willingness of American Tobacco Company to

turn over everything except certain correspondence between the Company and its jobbing customers:

> "Before the receipt of your notice and demand I had conferred with representatives of the Federal Trade Commission and attempted to explain to them thoroughly our position; you have already an admitted copy of our circular of June 19, 1921; we are willing to turn over to you absolutely all correspondence between the New York office and the salesmen of the Company having to do with this situation or otherwise. We are entirely willing to turn over to you all correspondence between us and any jobber whom we ultimately refused to sell, or to whose conduct in cutting prices we objected * * * With the exception aforesaid, and without reference to what our legal rights in the premises may be, your representatives are at full liberty to examine every book and paper in the possession of The American Tobacco Company, and we will be glad to facilitate such examination" (*Record*, pp. 15-16).

The real purpose, therefore, of the petition, and the effect of the mandamus if the writ is granted, are to require the American Tobacco Company to give to the Federal Trade Commission for its unlimited inspection and examination, with the right to take copies, all books, papers, correspondence and documents in the possession of American Tobacco Company.

Contention of the Parties, and Decision of the Court Below.

The petition for mandamus of the Federal Trade Commission sets forth that the Commission on October 14, 1921, had passed a resolution declaring it necessary to "gather and compile information concerning, and to investigate the organization of the business, conduct, practices and management of American Tobacco Company," and had resolved to conduct an investigation under authority of §6 (paragraph *a*) of the "Federal Trade Commission Act" (*Record*, p. 12). The petition further alleges that in August, 1921, the Senate of the United States by resolution directed: "* * * The Federal Trade Commission * * * to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference as to market price to producers of tobacco, and the market price for manufactured tobacco, and the price of leaf tobacco exported, and to report to the Senate as soon as possible the result of such investigation" (*Record*, p. 6). The petition further alleges that on or about September 16, 1921, there was filed with the Federal Trade Commission (by whom it is not stated) a complaint that American Tobacco Company was using certain methods of business practices resulting in unfair competition in that it was regulating and fixing, or attempting to regulate and fix, the prices at which the commodities sold by it should be resold by those to whom it had sold them (*Record*, p. 6).

The petition further alleges that on May 31, 1922 (some six months after the passage of the resolution referred to and the demands made on American Tobacco Company as aforesaid) a complaint had been filed by the Federal Trade Commission, and a copy of that complaint is made an exhibit to the petition. It is a complaint against American Tobacco Company and others for attempting to maintain reselling prices of American Tobacco Company's products in and around Philadelphia (*Record*, pp. 9, 20).

The answer of American Tobacco Company contended that by the terms of the statute (Federal Trade Commission Act, Act of September 24, 1914), no authority exists in Federal Trade Commission to have by mandamus an inspection and examination with leave to copy the papers and documents sought; that many of the papers and documents sought concern the intrastate, and not the interstate, business of American Tobacco Company, and many of them concern the intrastate, and not the interstate, business of its jobbing customers; that if the Federal Trade Commission Act authorizes such mandamus, the provisions of said Federal Trade Commission Act are in violation of the Fourth Amendment to the Constitution of the United States and the Fifth Amendment to the Constitution of the United States; and that the issuance of a writ of mandamus in the instant case would be inequitable, unjust and unnecessary, and not in the exercise of sound judicial discretion (*Record*, pp. 32-35).

Upon full argument before Judge Manton, he delivered a comprehensive opinion sustaining the contentions of respondent (*Record*, pp. 37-44):

> "To grant the relief prayed for by the petition would be to permit of an unreasonable search and seizure in violation of the Fourth Amendment. It was not the intention of Congress to grant such unlimited examination and inspection by the legislation in question, nor, indeed, did Congress have authority to do so under the Commerce Clause of the Constitution. It would be unreasonable and unjust to accede to the demands of the petitioner, and the application for the peremptory mandamus against the respondents, American Tobacco Company and P. Lorillard Company, is denied" (*Record*, p. 44).

Argument.

I.

The power of the Federal Trade Commission to secure, in invitum, the papers here sought does not arise from, nor is it affected by, any of the incidental matters set forth in the petition—such as the Senate resolution, and the complaint filed with, or the complaint filed by, the Federal Trade Commission—but it is no more and no less than if the Federal Trade Commission had on its own initiative, and without the existence of any of these incidents, concluded that it desired to examine these papers.

We understand that counsel for the Federal Trade Commission do not take issue on the foregoing proposition. This understanding is based on the argument and brief on behalf of Federal Trade Commission before Judge Manton. But, even if we are right in this understanding, it is well to eliminate these incidents from the case as they ought to have been eliminated from the petition:

Insofar as the Senate resolution is concerned (*ante*, p. 4) it is to be noted that it is a resolution of one House of Congress, and, therefore, and not being concurred in by the other House of Congress, it cannot add to the power that the Commission has under the statute:

> "The discussion in this case has taken a wide range and much has been said of

> the constitutional rights of the defendant and the authority of the Commission to carry out the purpose of the interstate commerce act, and to make investigations which shall be the basis of the discharge of duties imposed upon it by the law. But, as we view the case, the real questions may be determined by a consideration of certain provisions of the act to regulate commerce. *We may at the beginning put aside any question of authority derivable from the resolution passed by the Senate. The resolution was passed by only one branch of the legislative body, and it is not contended by the Government or the Commission that any authority is derivable from it.*" (Italics ours). (*United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318).

It is to be noted, further, that there is no suggestion in the Senate resolution that anyone is violating an anti-trust act, so that this resolution does not even come within sub-section (d) of §6 of the Federal Trade Commission Act which authorizes the Federal Trade Commission "upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violation of the anti-trust act by any corporation." Obviously the Senate resolution was, so far as it concerned the business of manufacturers of tobacco, aimed at profiteering, and, as pointed out by counsel for American Tobacco Company in the letter to the Federal

Trade Commission already noted, representatives of the Federal Trade Commission had, long before the demand made in this case, been in the offices of American Tobacco Company "investigating as to prices paid by us (American Tobacco Company) for leaf tobacco, costs of manufacture, and other such things * * * in order to comply with this resolution" (*Record*, p. 15).

It is to be noted, too, that the papers and documents sought here have nothing to do with any matter of leaf prices or of "profiteering" as contemplated by the Senate resolution. This proceeding is in fact an attempt to use American Tobacco Company's files to ascertain activities of its customers, without the definiteness and opportunity for judicial criticism that would be required and afforded if a *subpoena duces tecum* issued.

The second and third incidents are really connected together: On or about September 16, 1921, some unnamed person complained in some way to the Federal Trade Commission that American Tobacco Company was regulating and fixing, or attempting to regulate and fix, the price at which its commodities should be resold by those to whom it had sold them, and was co-operating with, aiding and abetting others, to successfully formulate and carry out a scheme or combination pursuant to which the resale prices of respondent's commodities should be fixed and maintained by jobbers. This complaint, it is to be noted, was made before the demand made on American Tobacco Company in October, 1921. On May 31, 1922, long after the demands were made, and the very day

that the petition for mandamus was verified, the Federal Trade Commission filed a formal complaint which charged American Tobacco Company and others with attempting to maintain reselling prices in the marketing of the products of American Tobacco Company in and about Philadelphia. Whether these two incidents are really the same incident—the informal complaint lodged with the Federal Trade Commission in September, 1921, having resulted in the formal complaint filed by the Federal Trade Commission in May, 1922—or whether they are two separate incidents, does not appear and is immaterial. The mere lodging of an informal complaint—not necessarily verified, not even necessarily written—by a person, not necessarily responsible,—cannot call into existence powers of the Federal Trade Commission. So far as the Philadelphia complaint already filed by the Federal Trade Commission, and exhibited with the petition, is concerned, its existence definitely calls to every one's attention how unnecessary for the proper and orderly functioning of the Federal Trade Commission is its possession of the extraordinary power here claimed for it: It has instituted a proceeding, and in that proceeding a *subpoena duces tecum* may issue, or a demand to produce for examination may be made, under which relevant papers would be required to be produced, but with the scope of the *subpoena duces tecum*, or demand, subject to judicial supervision and control.

The matter then, so far as the power of the Federal Trade Commission is concerned, and in-

sofar as the constitutionality of the act giving that power, is precisely as if none of these incidental things existed, and precisely as if the Federal Trade Commission, *sua sponte*, had concluded that it desired to investigate the conduct of the American Tobacco Company, a corporation engaged in the manufacture and sale of tobacco—engaged both in interstate and intrastate business—and had demanded access, first, to all its books, documents and correspondence, and upon all being thrown open to it except those mentioned as aforesaid by letter of counsel of American Tobacco Company to it, had demanded them.

II.

The Federal Trade Commission Act, as a matter of statutory construction, does not give to the Federal Trade Commission the authority to demand a production, for inspection, examination and copying, of the books and papers of a private corporation engaged, so far as the sale of some of its products is concerned, in interstate commerce, as demanded by the Federal Trade Commission in this proceeding.

Statute Must be Construed Having Regard to Constitution.

In approaching this question of statutory construction regard must be had always to the rule so definitely, but not for the first time, laid down

by the late Chief Justice White in *United States* v. *Delaware & Hudson Co.* (213 U. S. 366, 407, 408):

> "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, that it is our plain duty, to adopt that construction which will save the statute from constitutional infirmity * * * The rule plainly must mean that where a statute is susceptible to two constructions by one of which grave and constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

Adopting this cardinal principle of construction, we must look at the powers given to the Federal Trade Commission by the language of the Federal Trade Commission Act, reading into, and in connection with, that language, first, that Congress may constitutionally regulate interstate commerce but may not, itself, or by a court or commission, regulate, or investigate, *in invitum*, the affairs of individuals or corporations except as such affairs are, or are connected with, interstate commerce; second, that Congress, may not, under the Constitution, give authority to any commission or body to make an *unreasonable* search of the papers of this respondent because "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated."

Assuming the correctness of our first contention hereinbefore made, to-wit: that the Federal Trade Commission has no more power herein than if its whole activity had been *sua sponte*, what we have to consider, to-wit: the language of the Federal Trade Commission Act, material to this discussion, is not great in volume. We conceive that the statutory words to be considered are as follows:

> "§6. That the Commission shall also have power——
>
> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations, and to individuals, associations and partnerships.
>
> §9. That for the purpose of this act the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for purposes of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; * * * Upon the application of the Attorney-General of the United States at the request of the Commission, District Courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this act, or any order of the Commission made pursuant thereto."

There are other provisions of the statute that may have to be considered, but it will be only in a collateral, or argumentative way; it will not be denied that the Commission, if it is to succeed in this mandamus proceeding, must succeed by virtue of the language of the statute just hereinbefore fully quoted.

In the foregoing language, one is at once struck with the phrase "documentary evidence." It is true that §4 of the Act, devoted to definitions, says that "documentary evidence" is all documents, papers and correspondence in existence at and after the passage of the Act. By this definition we conceive that it is established that no document, paper or piece of correspondence in existence, on account of its form or substance, may be claimed to be excluded from the term "documentary evidence." Nevertheless it is "*evidence*" only that the duly authorized agent or agents of the Federal Trade Commission are to have access to, and it is "evidence" only that by *subpoena duces tecum* witnesses may be required to produce. No other adjective is so closely associated with the noun "evidence" as the adjective "relevant"—indeed, the noun connotes the adjective, so that one can hardly conceive the one without the other. Before either the noun or the adjective can be conceived, there must be a subject matter—a subject matter induced by a complaint, or determined upon as the particular matter demanding investigation—as to which evidence is desired, and as to which a court may determine whether or not the "evidence" sought is or would be *relevant*.

PURELY INTRASTATE MATTERS ARE TO BE EXCLUDED.

Section 6 of the Federal Trade Commission Act may seem to empower the Federal Trade Commission to investigate all the affairs of a corporation engaged in interstate commerce—affairs of organization, conduct, practices and management,—without limitation. These words, though, have a limitation, for it is only activities that constitute, or are related to, interstate or foreign commerce that are subject to the control, or to the inspection, of Congress or a congressionally created board.

In *United States* v. *Basic Products Co.* (260 Fed., 472) the Federal Trade Commission sought a mandamus to require the Basic Products Company to submit to examination all of its "documents" and papers, with special reference to production costs and capital investment in the manufactured product known as "Syndolag." The syllabus of the decision would indicate that the Basic Products Company was not engaged in interstate commerce, but the body of the opinion indicates that it was engaged in interstate commerce precisely as this respondent, American Tobacco Company, is:

> "Nowhere has it been made to appear that the defendant engaged in interstate commerce in any other way than any other corporation or any citizen may be so engaged, by making one or more shipments of manufactured goods from one state to another" (pp. 479-480).

The Court held that the Commission, though, was not entitled to make this examination, because cost of production is not an interstate matter, and because the purposes of the Federal Trade Commission, in the investigation sought to be made as revealed in its notices and demands, had nothing to do with interstate commerce, but was in order to supply information to the Navy Department so that the Navy Deparment might intelligently arrive at a purchase price for the product of defendant. In the course of the opinion, the Court said:

> "Counsel for the defendant urges upon this Court the necessity of declaring §6 of the Trade Commission Act to be unconstitutional. Not only 'insofar as it authorizes investigations and compulsory disclosures of matters which are beyond the commerce powers of Congress,' but also 'insofar as it attempts to authorize a search or seizure by an administrative agency of the government without charge or suspicion of wrong doing.' While the contention of counsel is probably sound, this Court does not deem it necessary to go further than to hold that the Commission had not the power to carry on the investigation which they have assumed in the present case" (p. 482).

In *Maynard Coal Co.* v. *Federal Trade Commission* (48 Wash. Law Rep. 278), the Supreme Court of the District of Columbia considered a case in which the Federal Trade Commission sought to recover penalties for the refusal of

the respondent to give information in regard to matters which the respondent considered intrastate, and the Court held (quoted from the syllabus):

> "The mere fact that a corporation engaged in the mining, production and selling of coal, ships a portion of its product into other states, does not subject its business of producing or its intrastate commerce to the visitorial powers of Congress under the constitutional ground of authority to regulate commerce."

In *Hale* v. *Henkel* (201 U. S. 43), this Court, having asserted the visitorial right of Congress over a state corporation "so far as they involve questions of interstate commerce," was careful to add:

> "It is not intended to intimate, however, that it (the Congress and boards created by congressional enactment) has a general visitorial power over state corporations" (p. 75).

Adopting the principle laid down in the cases heretofore cited, and construing §6 of the Federal Trade Commission Act so as to bring it within the constitutional power of Congress, we must then limit the investigating power of the Federal Trade Commission to the investigation of "organization, business, conduct, practices and management of any corporation engaged in commerce"—insofar as such is or affects interstate commerce. So construed, it is obvious that the demand set forth in the petition for mandamus in this case is too broad, and it is equally obvious that the conces-

sions that respondent had already made before the petition for mandamus was filed, were broader than could have been secured by the Federal Trade Commission. The answer sets up that much of the correspondence between American Tobacco Company and its jobbing customers refers to none of the interstate commerce of American Tobacco Company—many of its jobbers are in the same state as its factories; much of its correspondence with jobbing customers, in the nature of things, has no relation to the organization, business, conduct, practices or management of American Tobacco Company at all, but has to do with the activities of jobbing customers engaged in local business, with their credit conditions, with their own methods of solving their own local problems. The offer made by American Tobacco Company that preceded the filing of the petition for mandamus, was in fact an offer to segregate and exhibit all correspondence indicative of the conduct and practices of American Tobacco Company itself, interstate and intrastate.

Not only is this Court constrained to adopt a construction of the Federal Trade Commission Act that will confine the activities of the Federal Trade Commission—whether by orders or by investigation—to matters and things that are or are connected with interstate commerce, but it must also adopt a construction that will save the statute from the constitutional infirmity that would be involved if under its terms the Federal Trade Commission had been authorized to make an "unreasonable search and seizure" of the "papers" of this respondent:

Cases Determined Under Like Provisions of Interstate Commerce Act Demonstrate the Power Here Claimed is Not Given by Congress.

The Federal Trade Commission Act was passed in 1914. The Interstate Commerce Act was passed in 1887. Each of these statutes established commissions, the Interstate Commerce Act a commission to operate in the regulation of the interstate business of carriers, and the Federal Trade Commission Act a commission to prevent unfair methods of competition in the interstate business of private corporations and individuals engaged in interstate trade. Each of these commissions has been given powers by Congress, undoubtedly to be in aid of their respective regulatory functions, to require corporations or persons to submit for inspection of the Commission books, papers or "documentary evidence." All of such statutory authority, so far as the Federal Trade Commission is concerned, is in the Act of September 26, 1914; so far as the Interstate Commerce Commission, though, is concerned, there have been amendments and supplements to the statute of 1887 that created it.

Not unnaturally there is a similarity of language in the statutes that confer powers of investigation, *in invitum*, on the Interstate Commerce Commission and the statute that confers powers of investigation, *in invitum*, on the Federal Trade Commission. In the absence of authoritative adjudications by this Court in complete construction of the later Federal Trade Commis-

sion Act, we quite naturally look for light in the construction of its language to decisions of this Court in the construction of somewhat similar language in the statutes that affect the Interstate Commerce Commission.

In all this, though, there should be constantly borne in mind the distinction between interstate carriers—public service companies—and private manufacturing corporations engaged primarily in production, which is not interstate commerce, and only incidentally, in the selling of goods, engaged in interstate commerce. This Court itself has recognized that there is a real and broad distinction between the two: The earliest case having to do with the judicial enforcement of the right of the Interstate Commerce Commission to inspect books and papers of the interstate carriers (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447) recognizes the peculiar responsibility on carriers, because of the public objects which they subserve, and the governmental authority—eminent domain—which they exercise, to submit to a high degree to governmental control:

> "And the theory upon which the judgment (the judgment in the Court below that denied the relief prayed by the Interstate Commerce Commission) proceeded is applicable alike to corporations and individuals, although by the established doctrine of the courts a railroad corporation may, under legislative sanction and upon making compensation, appropriate private property for the purpose of its right of

> way, because and only because his road is a public highway established primarily for the convenience of the people and to subserve public objects, and, therefore, subject to governmental control" (pp. 474-475).

Again, in a late case (*Smith* v. *Interstate Commerce Commission*, 245 U. S. 33), Mr. Justice McKenna recognized definitely the same obligation on public carriers:

> "If it be grasped thoroughly and kept in attention that they (railroad companies) are public agents, we have at least the principle which should determine the judgment in particular instances of regulation or investigation; and it is not far from true—it may be it is entirely true, as said by the Commission—that 'there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce'" (p. 43).

Perhaps a simple method of keeping in mind this greater obligation imposed on public service corporations than on private trading corporations, as applied to the matter now under discussion, is to apply the following formula to discussions that have been had by this Court of statutes conferring powers on the Interstate Commerce Commission to require the production and inspection, *in invitum*, of books and papers: When this Court, under certain circumstances, has construed given words as not giving the power to the Interstate Commerce Commission, then, *a fortiori*, the Federal Trade Commission, under like circumstances and with like statutory words, has not the power;

if this Court, with given statutory words and under given circumstances, has affirmed the power of the Interstate Commerce Commission, then such holding, with like words and under like circumstances, *tends to establish* the power in the Federal Trade Commission, but *does not conclusively establish such.*

It has seemed to us, and evidently seemed to Circuit Judge Manton in the Court below, that the doctrines announced by this Court in *Harriman* v. *Interstate Commerce Commisssion* (211 U. S. 407), not modified or limited by any subsequent decisions of the Court so far as we are aware, is conclusive in this case. We have heretofore quoted the whole of the Federal Trade Commission Act, that bears on the right of the Commission to investigate, but in order that the opinion of the Court in the *Harriman Case* and its complete applicability to the instant case, may be seen, we are again quoting the basis of the Federal Trade Commission's asserted power, and the corresponding provisions of the Interstate Commerce Commission statute, as referred to in the opinion of this Court in the *Harriman Case*:

Federal Trade Commission Statute.	*Powers of Interstate Commerce Commission referred to in the Harriman Case.*
"§6. That the Commission shall also have power——	The Interstate Commerce Commission has "authority to inquire

"(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations, and to individuals, associations and partnerships.

into the management of the business of all common carriers, subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties, and carry out the objects, for which it was created; and the Commission is hereby authorized to execute and enforce the provisions of this act" (p. 418). Sec. 12 of the Act.

The Interstate Commerce Commission is required to file an annual report containing "such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations

"§9. That for the purposes of this act the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for purposes of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.

"Such attendance of witnesses and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing."

as to federal legislation relating thereto as the Commission may deem necessary" (p. 420). Sec. 21 of the Act.

"For the purposes of this act the Commission (Interstate Commerce Commission) shall have power to require, by subpoena, the attendance and testimony of witnesses, and the production of all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation," and such may be required "from any place in the United States at any designated place of hearing" (p. 419). Sec. 12 of the Act.

The Interstate Commerce Commission, of its own motion, set afoot an investigation into suspected consolidations and combinations of carriers, including suspected community of interest in competing carriers, and ordered that a proceeding of investigation and inquiry into these matters be instituted, and set a time and place for a hearing. At this hearing Mr. Harriman and members of the partnership of Kuhn, Loeb & Co. were asked questions and requested to produce books and papers as to community of interest in various interstate railroads, and declined to produce the papers or answer the questions. The right of the Interstate Commerce Commission to have the information, *in invitim*, thus sought by it, is the matter that was discussed in the *Harriman Case*. This Court refused to permit the Interstate Commerce Commission to force the production of documents and answers to questions that would supply the information it had sought, and put its refusal definitely and distinctly on the construction of the sections of the Interstate Commerce Act just hereinbefore exhibited in parallel columns with analogous provisions of the Federal Trade Commission Act. Since the decision was on statutory construction, and since the statutes in essential respects are so similar, it must be evident that the decision of this Court in the *Harriman Case* is in the instant case likely to be controlling.

The following are quotations from the opinion of this Court:

> "The argument for the Commission is that the purposes of the Act embrace all the duties that the Act imposes and the powers that it gives the Commission; that one of the purposes is that the Commission shall keep itself informed as to manner and method in which the business of the carriers is conducted, as required by section 12; that another is that it shall recommend additional legislation under section 21 to which we shall refer again, and that for either of these general objects it may call on the Court to require anyone whom it points out to attend and testify if he would avoid the penalties for contempt.
>
> "We are of opinion, on the contrary, that the purposes of the Act for which the Commission may exact evidence *embrace only complaints for violation of the Act,* and investigations by the Commission upon matters that might have been made the object of complaint. As we already have implied, the main purpose of the Act was to regulate the interstate business of carriers, and the secondary purpose, that for which the Commission was established, was to enforce the regulations enacted. These, in our opinion, are the purposes referred to; in other words, the power to require testimony is limited, as it usually is in English speaking countries at least, to *the only cases where the sacrifice of privacy is necessary—those where the investigation con-*

cerns a specific breach of the law" (pp. 419-420). (Italics ours).

* * * * * *

"If by virtue of section 21 the power exists to summon witnesses for the purpose of recommending legislation, we hardly see why, under the same section, it should not extend to summoning them for the still vaguer reason that their testimony might furnish data considered by the Commission of value in the determination of questions connected with the regulation of commerce. If we did not think, as we do, that the Act clearly showed that the power to compel the attendance of witnesses so to be exercised only in connection with the quasi-judicial duties of the Commission, we still should be unable to suppose that such an unprecedented grant was to be drawn from the counsels of perfection that have been quoted from sections 12 and 21. *We could not believe on the strength of other than explicit and unmistakable words that such autocratic power was given for any less specific object of inquiry than a breach of existing law in which, and in which alone, as we have said, there is any need that personal matters should be revealed*" (p. 421). (Italics ours).

* * * * * *

"If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits" (p. 422).

Unless there has been a modification of the decision, or the grounds for the decision, in the *Harriman Case*, it is difficult to see how or why it is not controlling in the instant case. The right to privacy protected by the decision in the *Harriman Case* is a sacred right, undoubtedly, but it has not the solemn constitutional guaranty that the Fourth Amendment gives against unreasonable searches and seizures of private papers. The language that gave the right to the Interstate Commerce Commission to investigate was different from, but as we conceive it, as broad as, the language that gives the Federal Trade Commission the right to investigate. The purposes of the Interstate Commerce Commission in the investigation sought to be made in the *Harriman Case*, were no more nebulous than the purposes of the Federal Trade Commission in the instant case—in neither the one case nor in the other does it appear that the purposes actuating the examining body included the "purpose" of Congress in the establishment of that body. In the one case no more than in the other, does the investigation "concern a specific breach of the law," the only situation in English speaking countries at least "where the sacrifice of privacy is necessary." In the one case no more than in the other, is a Commission engaged in a quasi-judicial duty that can justify the utilization of "such autocratic power."

When one considers the language of this Court already quoted, it does not avail to insist that the *Harriman Case* is not controlling in the instant

case on the ground that in the *Harriman Case* natural persons were witnesses, whereas in the instant case it is a corporation whose correspondence to, and from, jobbing customers is sought to be ruthlessly seized and examined in its entirety by this Commission, because:

(a) This Court has held that the decision in the *Harriman Case* was controlling as to the construction of the statute there involved in a later attempt of the Interstate Commerce Commission to have produced by a Railroad Company its files of correspondence (*United States* v. *L. & N. R. R.*, 236 U. S. 318, 330).

(b) Corporations as well as natural persons are protected by the Fourth Amendment against unreasonable searches and seizures, and to the same extent (*Hale* v. *Henkel*, 201 U. S. 43; *Silverthorne Lumber Co.* v. *United States*, 251 U. S., 385; *Coastwise Lumber & Supply Co.* v. *United States*, 259 U. S., 847).

(c) Respondent herein is a manufacturing corporation only incidentally engaged in interstate trade, and is in fact a group of natural persons exercising no public franchise, of whom it cannot be said, as has been said of carriers, that "there can be nothing private or confidential in its activities and expenditures."

> "In the present day one does not devote one's property or business to public use, or clothe it with a public interest, merely

> by making commodities for, and selling them to, the public in the common callings." (Syllabus, *Wolff Co.* v. *Industrial Court*, 262 U. S., 522, 523).

(d) The Court in the *Harriman Case* was dealing with matters of substance, and of the highest moment to the citizens of the country and to the institutions of our republic; so, also, in the instant case are the issues no less substantial and of no less moment. The jobbing customers of this respondent are many of them natural persons, many of them co-partnerships, and many of them engaged in intrastate trade only and to whom goods have been sold only in intrastate trade. This is an effort to invade not only the privacy of respondent but their privacy, as well, in what are undoubtedly matters in which they highly esteem privacy—matters of credit, excuses for delayed payments, promises to pay that are broken, unpleasant comments on activities of competitors—all of such is in the correspondence which this Commission seeks to look at and copy, without the slightest supervision of a court. This is a Commission, it is to be noted, that has the power under the act creating it, "to make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest"; (*Federal Trade Commission Act*, §6, *sub-section* f).

How far were the substance of this Court's determination in the *Harriman Case* and the princi-

ples therein announced induced by and consistent with previous pronouncements by this Court, and how far have they been confirmed, and how far departed from, if at all, by the later pronouncements of this Court?

> "We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. *Neither branch of the legislative department, still less any administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen.*" (*Interstate Commerce Com.* v. *Brimson*, 154 U. S., 447, 478). (Italics ours).

In support of the foregoing statement of principles, Mr. Justice Harlan, delivering the opinion of the Court, cited *Kilborn* v. *Thompson* (103 U. S., 168), and *Boyd* v. *United States* (116 U. S., 616), and cited also with approval the language used by Mr. Justice Field, while sitting at circuit, in *In re Pacific Railway Commission* (32 Fed. 241):

> "Of all the rights of the citizen, fewer are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, *but exemption of his private affairs, books and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.*" (Italics ours).

Without referring here in detail to the cases of this Court that have reasserted and enforced the right of the citizen to be protected against unreasonable searches and seizures (*Weeks* v. *United States*, 232 U. S., 383; *Silverthorne Lumber Co.* v. *United States*, 251 U. S., 385; *Gouled* v. *United States*, 255 U. S. 298), reference may be made to subsequent cases that discuss the principles that are to govern in the construction of statutes under which "autocratic powers" are sought to be exercised:

In *United States* v. *Louisville & Nashville R. R. Co.* (236 U. S., 318), the Court considered a writ of error by the Government from the decision of the lower court refusing a writ of mandamus which the Interstate Commerce Commission had attempted to obtain to enable it to examine correspondence that the Louisville & Nashville Railroad Co. had had with various people. The parts of the statute which the Interstate Commerce Commission relied on were section 12 of the Interstate Commerce Act, which has hereinbefore been set out in connection with the discussion of the *Harriman Case*, and section 20 of the Act, which had been passed or amended after the decision in the *Harriman Case*. This Court, having declared the claim as to the authority of the Commission under section 12 settled against the Commission by the *Harriman Case* (pp. 329-330), considered section 20, and found that it and amendments thereto provided that the Commission might, in its discretion, prescribe forms for

accounts, records and memoranda, and that the Commission should at all times have access to "all accounts, "records and memoranda kept by carriers," and that it should be unlawful for carriers to keep any other accounts, records and memoranda than those prescribed, and that carriers were penalized for neglecting to make true and correct entries into accounts, records and memoranda of all facts and transactions appertaining to the carrier's business, and that the statute referred otherwise to accounts, records, memoranda or documents of carriers. Notwithstanding these broad powers, and undoubtedly recognizing that correspondence, "copies of letters written by the President of the corporation in the course of its transactions are as much a part of its documentary property * * * as its ledgers and minute books" (*Wilson* v. *United States*, 221 U. S. 361, 377), this Court held that Congress did not authorize, and, it seems to us, argued that it could not have authorized, the compulsory production of correspondence there sought.

> "* * * The primary object to be accomplished was to establish a uniform system of accounting and bookkeeping, and to have an inspection thereof. If it intended to permit the Commission to authorize examiners to seize and examine all correspondence of every nature, Congress would have used language adequate to that purpose. A sweeping *provision of that nature attended with such consequences, would not be likely to have been enacted without probable exceptions as to some lines of cor-*

respondence required to be kept open and subject to inspection upon demand of the agents of the government. • • •

How far such a demand as embodied in this petition can be permitted within the constitutional rights set up by the defendants, we do not need to consider, as we do not think that that section of the act of Congress under which the demand was made authorizes the compulsory submission of the correspondence of the company to inspection. It is true that correspondence may contain a record, and it may be the only record of business transactions, but that fact does not authorize a judicial interpretation of this statute which shall include a right to inspection which Congress did not intend to authorize" (p. 336). (Italics ours.)

In *Ellis* v. *Interstate Commerce Commission* (237 U. S. 434) there was an attempt to enforce answers by a witness to questions in a proceeding brought by the Interstate Commerce Commission on an alleged complaint made to it that the practices of interstate carriers with respect to the handling and icing of cars used by the packers, violated the Interstate Commerce Act in various ways. The witness, a vice-president and general manager of the Armour Car Lines, refused to answer certain of the questions, and with respect thereto this Court said:

> "The appellant's refusal to answer the series of questions put, was not based upon any objection to giving much of the infor-

> mation sought, but on the ground that the counsel who put them avowed that they were the beginning of an attempt to go into the whole business of the Armour Car Lines—a fishing expedition into the affairs of a stranger for the chance that something discreditable might turn up. This was beyond the power of the Commission. *In re Pacific Railway Commission* (32 Fed. 241); *Interstate Commerce Commission* v. *Brimson* (154 U. S. 447, 478-479); *Harriman* v. *Interstate Commerce Commission* (211 U. S. 407)" (p. 445).

It is not usually of aid to this Court to cite, on a question of this kind, the decisions of lower Federal Courts. The opinion, though, of Circuit Judge Rose in *Federal Trade Commission* v. *Baltimore Grain Co.* (284 Fed. 886), is so well considered, and is so apposite to the question now under discussion, as well as to questions that will be discussed later in this brief, that reference to it is, we conceive, aidful to this Court. In that case, as in this, the Federal Trade Commission sought to compel by mandamus the production of "all letters and telegrams passing between the respondents and the latter's (the corporation's) jobber customers throughout the United States, during the calendar year 1921." In that case, as in this, there was no charge by the Commission of any violation of law, but the right claimed was based upon the construction of the statute that gives to the Commission power "to investigate the organization, business, conduct, practices and

management of any corporation engaged in commerce." In that case, as in this, the petition of the Commission gave as part of the reason for the investigation a Senate Resolution. It is true that in that case there was no allegation that any complaint had been filed, whereas in the instant case there is such allegation—the importance and relevancy of that complaint and of this distinction has been already hereinbefore discussed. The Court refused the injunction, on the construction of the Federal Trade Commission Act. The Court concluded, from words of the statute and its congressional history, that Congress intended to give no such powers as were claimed by the Federal Trade Commission:

> "But so far as concerns non-public service corporations at least, the inquiry in which the Commission is engaged, whatever it is, must be more or less definite and restricted in its character so that the activities of its minor agents, to whom in practice the actual search must necessarily be confided, can be kept within some bounds. Very possibly, to sustain any right of inspection and searching, it must also appear that there is some reasonable proportion between the public value of the information likely to be obtained and the private annoyance and irritation it will occasion. * * * If it (the Federal Trade Commission Act) really means that whenever the Commission thinks best to make an inquiry into the way in which some great department of commerce is carried

> on, it may send its employees into the office of every private corporation which does an interstate business in that line and empower them to go through the company's books, correspondence and other papers, I am satisfied it goes beyond any power which Congress can confer, in this way at least" (pp. 889-890).

Equally careful and frank consideration will be given to cases which it was assumed or argued by counsel for the Federal Trade Commission in the Court below, limited or modified the principles announced in the *Harriman* case. These cases, on the question now under discussion, to-wit: the proper construction of the statute giving authority to a commission to investigate, are not numerous:

Baltimore & Ohio R. R. Co. v. *Interstate Commerce Commission* (221 U. S. 612) considered an act of Congress regulating the hours of labor of railway employees engaged in interstate commerce, and an order of the Interstate Commerce Commission requiring carriers to make monthly reports showing the instances where employees subject to the act had been on duty for a longer period than that allowed. The Court held the act itself and the order of the Commission were valid. Of course this was holding, as has frequently been held by this Court, and is not in any way contested in the instant case, that a corporation may not plead privilege against self-incrimination under the Fifth Amendment. It

was recognized by the Court that the requirement of these reports had not the faintest semblance of an unreasonable search and seizure, and the only construction of the statute that was involved in the decision of the Court was the construction of Section 20 of the Interstate Commerce Act which authorizes the Commission "by general or special orders to require said carriers or any of them to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or keep itself informed or which it is required to enforce."

The difference, so far as the Fourth Amendment is concerned, between the powers granted by a provision such as this and the powers claimed in the instant case, is too obvious to need discussion or elaboration. It is precisely in this way, to-wit: by special or periodic reports, under oath if the Commission so desires, that a governmental commission ought to inform itself and function, and not by the wholesale inspection of correspondence, nine-tenths of which must in the nature of things be irrelevant to any matter possibly in the jurisdiction of the Commission.

In *Interstate Commerce Commission* v. *Goodrich Transit Co.* (224 U. S. 194), consideration was given to the scope and effect of Section 20 of the Interstate Commerce Act as amended, which section as amended was later considered by this Court in *Louisville & Nashville Railroad Co.*

v. *Interstate Commerce Commission* (*supra*). This Section 20 as amended authorizes the Commission to prescribe forms of accounts, records and memoranda to be kept by interstate carriers, to which accounts the Commission is given access. There was involved in the case, first, the validity of this Section 20, and the Court held that it was a valid act, and essential to the main purposes of the Interstate Commerce Act. It was contended further, though, by the carrier, that its business included not only the carriage of passengers and freight inter- and intra-state, but that it owned and operated in connection with such business certain amusement parks, and that the report called for a description of such intra-state operations, with the statement of income from and expense of the same. The Court upheld the right of the Commission under the statute, to require the fiscal operations of these intra-state activities to be shown in accounts in form prescribed by it. The following sentences give the gist of the decision:

> "Bookkeeping, it is said, is not interstate commerce. True, it is not. But bookkeeping may and ought to show how a business which, in part at least is interstate commerce, is carried on, in order that the Commission, charged with the duty of making reasonable rates and prohibiting unfair and unreasonable ones, may know the nature and extent of the business of the corporation, the costs of its interstate transactions, and otherwise to inform itself so as to enable it to properly regulate the

> matters which are within its authority. We think the uniform system of accounting prescribed, and the report called for, are such as it is within the power of the Commission to require under Section 20 of the Act, nor do the requirements exceed the constitutional authority of Congress to pass such a law" (p. 216).

It will be noted that on the question of statutory construction, at any rate, there is no modification here of the views expressed by the Court in the *Harriman case*. It will be noted, too, that it was with respect to this same section of the Interstate Commerce Act that this Court, speaking through the same Justice, Mr. Justice Day, in *Louisville & Nashville R. R. Co.* v. *Interstate Commerce Commission* (*supra*), held, as a matter of statutory construction, that there had not been given the power to have an inspection of the correspondence of the carrier.

The inclination of this Court to discriminate between what is actually essential and reasonable to be known to a governmental body, and what is not essential and is therefore not within its power of inquiry, is indicated by a comparison of this *Goodrich Transit* case with the *Terminal Taxicab* case (241 U. S. 232). In this *Terminal Taxicab* case a commission of the District of Columbia which had authority to regulate charges on three-fifths of the taxicab business of the corporation, demanded information as to the charges made by the corporation in the two-fifths of its taxicab

business which was not subject to public regulation, and this Court denied the right to that information with the statement that

> "There is no such connection between the charges for this last (business not subject to the regulating power of the Commission) and the others, as there was between the facts required and the business controlled in *Interstate Commerce Commission* v. *Goodrich*" (p. 256).

In *Smith* v. *Interstate Commerce Commission* (245 U. S. 33), this Court held that the president of a railroad company may be required to testify to expenditures made by the railroad company for political or legislative purposes. It will be noted, in reading this case, that there was no contention on behalf of the president or on behalf of the railroad company that answers to the questions would be self-incriminatory. This Court recognized expressly the authority of the *Harriman* case, but found that it is "a necessary deduction from the cases that the investigating and supervising powers of the Commission extend to all the activities of carriers, *and to all sums expended by them which could affect in any way their benefit or burden as agents of the public.*" It is in this connection that this Court held, as has already been quoted, that "there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce."

Our contention on the foregoing is that under a proper construction of the act of Congress creat-

ing the Federal Trade Commission, the primary "purpose" of the Federal Trade Commission is to prevent unfair methods of competition in commerce, as provided in Section 5; that it has certain other purposes (confusedly called "powers") set out in subsections (c), (d) and (e) of Section 6 of the act, providing for the giving of its aid in enforcing the anti-trust acts in certain defined instances; that Congress gave it powers to investigate only to the extent reasonably necessary to the accomplishment of these purposes; that Congress never intended to give, and never gave, it unlimited power to delve into all the books, documents and correspondence of a corporation incidentally engaged in interstate commerce, on a simple "fishing expedition," or for the mere gratification of its own desire to investigate, thus subjecting to its scrutiny, with the possibility and probability of publication, intimate correspondence involving the intimate business matters of private citizens; that under a proper construction of the statute it is "evidence" that is to be produced, and while this "evidence" may include any and all "documents, papers and correspondence," there must be a subject matter of investigation, in a judicial, or quasi-judicial, proceeding, with respect to which duly constituted authorities—the Commission itself in the first instance, in the second instance the Court, if it is asked to aid the Commission by mandamus proceedings, or by proceedings ancillary to a subpoena *duces tecum*—may determine materiality and relevancy. This is the proper construction of the statute to be adopted by the Court, just as the Court gave this

construction to similar statutes in the *Harriman* case and in the *Louisville & Nashville Railroad* case (*supra*), being induced thereto, it may be admitted, by the belief that Congress would not likely have enacted a statute with such sweeping provisions and attended with such circumstances "without probable exceptions as to some lines of correspondence," etc., (*Louisville & Nashville* case), and also in order to avoid a succession of constitutional "doubts" (*Harriman* case).

III.

If this statute gave to the Federal Trade Commission the authority that is claimed by the Federal Trade Commission, it would be violative of the Fourth Amendment to the Constitution of the United States.

It is hardly necessary to remind this Court of the dignity and importance of the guaranty of rights here insisted upon. The Fourth Amendment to the Federal Constitution is an assurance to the people of the United States of America of a cherished and ancient part of Anglo-Saxon freedom. As recently as 1920 this Court recognized the high importance of the maintenance unimpaired of this guaranty of right in such solemn words as to make argument, further than a quotation of these words, impertinent.

> "It would not be possible to add to the emphasis with which the framers of our Constitution and this Court (in *Boyd* v.

United States, 116 U. S., 616, 29 L. Ed. 746, 6 Sup. Ct. Rep. 524, in *Weeks* v. *United States,* 232 U. S., 383, 58 L. Ed. 652, L. R. A. 1915 B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 191 5C, 1177, and in *Silverthorne Lumber Co.* v. *United States,* 251 U. S., 385, 64 L. Ed. 319, 40 Sup. Ct. Rep. 182) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments. The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen,—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly over-zealous executive officers." (*Gouled* v. *United States,* 255 U. S., 298, 303-304).

It is the duty of courts to be watchful for constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be *obsta prin-*

cipiis. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law." (*Boyd* v. *United States*, 116 U. S., 616, 635).

Difference Between Corporation and Natural Person in Enforcement of Fourth Amendment.

In beginning this detailed discussion, it is well to put in juxtaposition, two admitted propositions:

1. We admit that a corporation has not the right, under the Fifth Amendment to the Constitution, to protection against self-incrimination.

2. It will not be denied by counsel for the Federal Trade Commission that corporations are entitled to the protection of the Fourth Amendment.

Undoubtedly the Fourth Amendment and the Fifth Amendment are related in their history and purposes (*Boyd* v. *United States*, 116 U. S., 616, 633). The fact, though, that corporations are entitled to the protection of the Fourth Amendment against unreasonable searches and seizures, and are not entitled to the protection of the Fifth

Amendment against self-incrimination, suggests and demonstrates that the two amendments are not always to be enforced together, and that there may conceivably be searches and seizures condemned by the Fourth Amendment as unreasonable on other grounds than that they compel the giving of evidence against one's self.

Hale v. *Henkel* (201 U. S., 43), one of the early and conspicuous cases in which this Court held that corporations are not entitled to the privilege against self-incrimination conferred by the Fifth Amendment, is distinct in its holding that the corporation is entitled to immunity:

> "* * * under the Fourth Amendment against unreasonable searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. * * *
>
> * * * We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd Case*, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena *duces tecum*, against which the person, be he individual or corporation, is entitled to protection." (p. 76).

See also *Silverthorne Lumber Co.* v. *United States* (251 U. S., 385).

What is the "unreasonable" search and seizure against which the corporation is protected?

It is the right of the natural person to have his papers, as well as his private matters generally, protected from examination and publication, not only to prevent self-incrimination, but always, and, without respect to criminality, except in those cases where the sacrifice of privacy is reasonably necessary (*Harriman Case, supra*). The letters that the Interstate Commerce Commission tried to see in *United States* v. *Louisville & Nashville Railroad Co.* (*supra*) were not those tending to criminate, but they were those of a confidential nature, and it was with respect to their enforced production that the Louisville & Nashville Railroad Company contended that such would be contrary to the Fourth Amendment to the Federal Constitution, and with respect to which this Court refrained from discussion from a constitutional viewpoint, adopting in lieu thereof a certainly constitutional construction of the act of Congress. It was not the right to be protected against the use of his papers for self-incrimination, but "exemption of his private affairs, books and papers from the inspection and scrutiny of others," that Mr. Justice Field in *In Re Pacific Railway Commission* (*supra*) declared was a right essential to the peace and happiness of the citizen, without the enjoyment of which "all others would lose half their value."

These bases of right against unreasonable search and seizure, then, are other than the mere right to be protected against self-incrimination. To what extent are these other bases existent in favor of a corporation which claims protection under the Fourth Amendment, as compared with what they would be if a natural person, under like circumstances, claimed a like protection? The answer, to our mind, is that the rights of the natural person and the rights of the corporation are essentially the same. The right of the natural person, and of the corporation, to privacy must yield to the *reasonable* needs of the administration of justice and the functioning of government. The natural person and the corporation must give up the right of privacy and give embarrassing publicity to private matters and private letters (if such, in the case of the natural person, are not self-incriminating) when these constitute material and relevant testimony in litigation; the natural person and the corporation must give information of private affairs to the Treasury Department in order that it may intelligently collect income taxes.

Discussion of Visitorial Power.

A function of government to the reasonable exercise of which right of privacy must yield, is the proper "visitation" by governments of corporations of their creation, or subject to their laws—the exercise by governments of "visitorial power."

The term "visitorial power," and the word "visitation" as applied to corporations, have been discussed by this Court in *Guthrie* v. *Harkness* (199 U. S., 148). There the history of the words is set forth and a definition of "visitation" is quoted and adopted as follows:

> "Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and force an observance of its laws and regulations." (p. 158).

We are not concerned here with the power of the state, the creator of the corporation, nor with the question whether by virtue of the Fourteenth Amendment the Fourth Amendment has become applicable to the state (see *Hammond Packing Co.* v. *Arkansas*, 207 U. S., 322, 347-8); but we are concerned with the "visitorial power" of the Federal Government which concededly has nothing to do with the charter powers of the state corporation, and whether they have been exceeded or misused, but is interested and has the power only to "force an observance of its (the Federal Government's) laws and regulations." The cases, so far as we are aware, in which this Court has discussed federal visitation of state corporations, not engaged in public service, have always been in grand jury proceedings: *Hale* v. *Henkel*, *supra*; *Wilson* v. *United States*, *supra*; *Wheeler* v. *United States*, 226 U. S. 478; *Essgee Co.* v. *United States*, 262 U. S. 152).

Thus *Wilson* v. *United States* (221 U. S., 361) was a case in which the grand jury was consider-

ing charges against one Wilson, President of corporation U; a subpoena *duces tecum* was issued to corporation U requiring it to produce copy books containing copies of letters and telegrams signed or purporting to be signed by the President during the months of May and June, 1909; this subpoena was served on the President, the Secretary and certain directors; the directors of the corporation passed resolutions directing the officers having custody of the book in question to deliver it; it so happened that the officer that had the custody of this book was the President, and he asserted his right to refuse to produce the book because it was in his personal custody, and because, as he insisted, such production would constitute an unreasonable search and seizure of his papers, and would result in self-incrimination. It is to be noted that the corporation asserted no rights of its own, and it is to be noted, therefore, that the *decision* in the case, so far as it affects the constitutional or other rights of the corporation, can have no bearing on the instant case. It is true, though, that this Court, in the course of the discussion, used the following language:

> "But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of the government demands examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist produc-

> tion upon the ground of self-incrimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitorial power of the state, and in the authority of the national government where the corporate activities are in the domain subject to the powers of Congress" (p. 382).

The foregoing states the whole doctrine of "visitorial power" so far as such doctrine has relevancy here. It is after the decision of *Hale* v. *Henkel* (*supra*), also a grand jury proceeding, and embodies the doctrine of that case. What is this Federal "visitorial power" then? It must be only as to activities "in the domain subject to the powers of Congress"; it must be only to "force an observance of *its* laws and regulations" (of Congress); it must be "expressed in lawful process"—that is, by a process clearly enabled and authorized by congressional enactment; it must be "within the limits which reason imposes in the circumstances of the case." It must, of course, not be "unreasonable search and seizure" —for ancient as is the phrase "visitorial power", that phrase does not appear in our Bill of Rights.

Now, what is the process in this case? A resolution by the Federal Trade Commission to

"conduct an investigation * * * and for the further purpose of gathering and compiling information concerning the organization, business, conduct, practices and management of said American Tobacco Company" (Record, p. 12). This was followed by a formal demand served on the American Tobacco Company for "opportunity to examine all documentary evidence, including all documents, papers, and correspondence in your custody or under your control" (Record, p. 14). This demand has never been abated nor modified, and the petition for mandamus asks for compulsory production of a part, instead of all, of the correspondence, papers and documents of American Tobacco Company only because all except those thus asked for in the petition have already been obtained. We do not profess to be able to give the precise line at which the right of a body which claims to be exercising the "visitorial power" that resides in the federal government must yield to the constitutional inhibition against unreasonable search and seizure. But in the instant case no precise line need to be defined or described—wherever the line may be, this attempt by this Commission passes beyond it: This attempt meets none of the tests laid down for the proper exercise of federal visitorial power: It goes beyond the "domain subject to the powers of Congress" because it goes into every domain covered by the activities of the American Tobacco Company. It is not, and does not purport to be, a visit to "force an observance of the laws and regulations of Congress," because it charges

no violation of any law or regulation of Congress. It is not "expressed in lawful process,"—it is not, as we believe has been demonstrated already hereinbefore, clearly enabled and authorized by any congressional enactment. Above all, it is not "within the limits which reason imposes in the circumstances of the case." Assertion is not argument, we know; but we can only assert, as our deliberate view of the matter, that if the search and seizure demanded by this mandamus proceeding, and the prior course of the Commission, is not unreasonable, then no search, initiated by any governmental body to which has been confided a part of the visitorial power that Congress may exert over private corporations engaged in part in interstate commerce, can be conceived that is unreasonable.

Arguments Made on One Phase of This Case are Applicable to the Other.

In the nature of the case, in a brief that attempts to deal with the question of statutory construction *and* the question of the constitutionality of the statute, if a given construction is adopted, argument on each of these questions runs into argument on the other: Some of the most cogent discussions by this Court of the constitutional rights of the citizen have been in cases in which the holding of the Court has been that under the construction of the statute adopted by it no determination was required of the constitutional question discussed. Under this point, there-

fore, in this brief, we would ask a consideration by the Court of the cases already cited under the heading that discusses the "construction of the statute." The Interstate Commerce Commission has undoubtedly been given visitorial power, just as definitely as the Federal Trade Commission has been given such, and it was with recognition of this visitorial power, and its limitations, that the statements of constitutional principles by this Court, in the *Harriman Case* (*supra*), the *Louisville & Nashville Case* (*supra*) and the *Brimson Case* (*supra*) already quoted, have been made.

In the same way, considerations primarily intended to affect the judgment of the Court on the constitutionality of the statute, are properly to be taken into account by it in arriving at the proper construction to be put on the statute. Is it conceivable that Congress intended to invest its deputed visitor, the Federal Trade Commission, having a limited primary purpose, to-wit: the prevention of unfair competition, with authority to exercise such tremendous, and to us undoubtedly unreasonable, power, in securing information?

The point of the foregoing is that this Court will consider this brief and the quotations from the authorities, so far as they may be helpful to the Court at all, not altogether as separate points or compartments of argument, because the authorities cited on the one point are relevant and persuasive on the other.

Discussion of Brief Filed by Counsel for Federal Trade Commission.

This brief was virtually concluded before we had opportunity to see the brief of counsel for the Federal Trade Commission, to be filed in this Court. We have now seen a proof thereof, subject to change. It differs quite definitely from the position taken by counsel for the Federal Trade Commission in the presentation of the case in the Court below, and from what we assumed the position of the counsel of the Federal Trade Commission would be in this Court: We had understood, as stated in Point I hereinbefore, that it was by no means the position of the Federal Trade Commission that the investigation sought to be made was in order to determine whether the American Tobacco Company had induced its customers to charge upon a resale of products of the American Tobacco Company purchased by such jobbing customer, a higher price than these jobbing customers would otherwise have charged—in violation of the law as established in the *Beechnut Case*, 257 U. S. 441, or otherwise. We had by no means understood that the Federal Trade Commission purposed to confine its investigation to that, or to any other one phase or given phases of our activities, or in any way rested its right to the inspection of papers on any contention of relevancy to anything: The resolution of the Federal Trade Commission to investigate the "organization, business, conduct, practices and management" of the Amer-

ican Tobacco Company did recite the Senate Resolution hereinbefore referred to; it recited that a complaint had been filed with it charging "an unfair method of competition," without suggestion what such was; it did not recite or refer to the complaint filed by the Federal Trade Commission limited to activities in and around Philadelphia—indeed, such complaint was not filed until long after the resolution to investigate. The Chairman of the Federal Trade Commission, in a letter to counsel of the American Tobacco Company (Exhibit "E" to Petition, Record, pp. 16 *et seq.*), after citing the first paragraph of Section 9 of the Federal Trade Commission Act, "that for the purpose of this Act the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any documentary evidence of any corporation being investigated or proceeded against"; proceeds: "The Commission understands this paragraph to mean that the Commission has an unlimited right of access to the books and records of the corporation under investigation or being proceeded against, at all reasonable hours, and to make copies thereof. * * * In view of these conditions the Commission insists that its representatives be given full and complete access to any and all documentary evidence in the possession or control of the American Tobacco Company" (Record, p. 17).

It was our understanding that on behalf of the Federal Trade Commission the case was argued

on precisely these contentions in the Court below. This brief has been written on the assumption that such would be the contentions in this Court.

Now, if we correctly understand the brief of counsel of Federal Trade Commission to be filed in this Court, very definite emphasis is laid on the particular matter being investigated, and, while it may be true that there is no definite concession that the attitude which we had assumed to be the attitude of the Federal Trade Commission is untenable and too broad, the impression left by a reading of the brief is that there is no serious attempt to sustain the position taken by the Chairman of the Federal Trade Commission in the letter aforesaid, and the contentions made in the Court below. This shift of position, though, does not change the fact that if the writ of mandamus shall issue, the Commission will have had precisely what the letter of its Chairman, written in October, 1921, contended for, that is, "unlimited right of access to the books and records."

As we understand the brief to be filed in this Court by the Federal Trade Commission, the contention is that the American Tobacco Company is under investigation to determine (stating the matter most broadly and without regard to any rules of pleading or any contentions heretofore made by the Federal Trade Commission), whether it is inducing customers to resell its

products at a higher price than such customers would otherwise sell such products. In the first place, we by no means admit any visitorial right in any body created by Congress, to have any compulsory production of papers to investigate that subject. Congress has not regulated the price at which products of the American Tobacco Company shall be sold, and Congress has no right to regulate such (*Wolff Co. v. Industrial Court*, 262 U. S. 522); since the right of visitation is exercisable by Congress through a deputed visitor, even if the deputed visitor may act on its own initiative, only to "force an observance of its laws and regulations," it might be very well argued that the right of compulsory investigation is limited to investigations as to whether an *existing* law and regulation of Congress *has been violated*, and it seems to us clear that the visit cannot extend to the ascertainment of whether or not something has been done which, if done, is not only not forbidden by any present law, but may not under the Constitution be forbidden by any future valid law. Insofar as attempting to induce jobbers to charge a higher resale price than they otherwise would, such is or is not forbidden by act of Congress, and we dare say such may or may not in the future be forbidden by Congress by a valid statute, dependent upon what means are used (Compare *Colgate v. United States*, 250 U. S. 300, and the *Beechnut Case*, 257 U. S. 441).

We have stated the foregoing subject matter that the Federal Trade Commission is investigating, not by way of admission, then, that such a subject matter so broadly stated is in the visitorial

power of the Commission, nor as admitting that the Commission has the power without complaint to investigate questions at all, but because this does at least give us a standard, of some sort or other, from which to measure *relevancy*. If a search of private papers is ever to be determined to be reasonable, there must in the nature of things be a standard from which to consider the question of *relevancy*, because, without such standard, no one can start on the way to determine *reasonableness*.

Even if we admitted all of the contentions made by counsel in the brief to be filed, so far as such contentions have to do with statutory construction and constitutional law, there would still be involved in granting this mandamus a highly unnecessary, and therefore highly unreasonable, search of private affairs: In the first place, assuming that the American Tobacco Company is the corporation now being subjected to investigation, it is only *its* activities that are, by the terms of the Federal Trade Commission Act, subject to this investigation; but it must be apparent that the Commission is seeking to ascertain, in this way, the activities of jobbers and associations of jobbers, as well. In the second place, it must be apparent to the Court that, with respect to the ordinary correspondence between a manufacturing concern and its five thousand customers, several hundred letters that pass would be utterly irrelevant to the question that is now, it is said, being investigated to one letter that would have any possible relevancy thereto. Could it be conceivable that this compulsory search and seizure is rea-

sonable, having regard to the circumstances of the case, when it involves the invasion and destruction of a hogshead of privacy on the assumption that there will result a pint of relevant evidence?

It is not to be forgotten, too, that there would be no practical difficulty, under the process of *subpœna duces tecum*, in segregating the infinitesimal modicum of relevant matter from the mass of private and confidential correspondence that can have no possible relevancy. A subpœna, that is a "lawful process confining its requirements to certain described documents and papers easily distinguished and clearly described" (*Essgee Co.* v. *United States*, 262 U. S. 151, 157), requiring the American Tobacco Company to "produce all letters and memoranda written by it to its customers or salesmen that refer directly or indirectly to prices to be charged by its customers for products manufactured by it," would produce the relevant matter, and would exclude the irrelevant. If it be said that such process would permit the American Tobacco Company to refrain from, and neglect, the production of some relevant piece of correspondence, it may be answered that the same bad faith and contempt of court that would enable such, would enable the American Tobacco Company, under any order to produce letters and documents, to abstract from the files those that were embarrassing before turning over the balance.

Even if we should concede, which we do not, that a mandamus to produce papers for inspection may be substituted for the infinitely more ap-

propriate procedure of *subpoena duces tecum*, with its superior means of protecting the citizen, where would we arrive, under the brief to be filed with this Court by counsel of Federal Trade Commission? The proceeding brought just before the petition for mandamus was filed was a proceeding that referred to activities in and around Philadelphia, and nowhere else. Is it conceivable that letters that have passed between the American Tobacco Company and its customers in Louisiana, Maine, Wisconsin and North Dakota, have any relevancy to that proceeding? Add to this the matter that some unnamed person filed with the Commission a fault finding letter that the American Tobacco Company was elsewhere pursuing a course of co-operation with its jobbing customers such as condemned in the *Beechnut Case*, *supra*, and you have only broadened the territory of operation beyond Philadelphia. It still remains true that the question propounded hereinbefore: "Is the American Tobacco Company inducing its jobbing customers to charge more on the resale of products of its manufacture bought by them, than they otherwise would," is the broadest and most favorable to the Commission of any standard for relevancy that can be conceived. We earnestly insist that, measured by that standard, the mandamus here sought is so broad—so unnecessarily broad—as to be beyond the powers of the Federal Trade Commission, whether such powers be measured by the words of the statute under which it is functioning; or measured by the constitutional provision that protects the citizens, including corporations, against unreasonable search and seizure.

IV.

The judgment of the Court below refusing the writ of mandamus should be affirmed because it was a correct and wise exercise of the discretion vested in the Court.

The Federal Trade Commission Act in its provision for mandamus in aid of the Federal Trade Commission in securing access, for purposes of examination, to documentary evidence, does not assume to modify the ordinary rules of practice in mandamus cases, and it does not require courts, as a matter of right, to issue writs of mandamus.

> "Upon the application of the Attorney-General of the United States, at the request of the Commission, the District Court of the United States *shall have jurisdiction to issue writ of mandamus* commanding any person or corporation to comply with the provisions of this act or any order of the Commission made in pursuance thereof" (Section 9, Federal Trade Commission Act). (Italics ours.)

Jurisdiction thus being given to the District Court, the District Court must look to the law generally as to writs of mandamus when a petition for the writ is made by the Federal Trade Commission. It is elemental that mandamus is not a writ of right, but will issue only when in the sound discretion of the Court the Court has determined that justice demands it (*Turner* v. *Fisher,* 222 U. S. 204). *Turner* v. *Fisher* is a

case in which a mandamus was sought to compel action by a government official, and was brought by a private person. In *United States* v. *Louisville & Nashville* (*supra*), though, the mandamus was sought by a governmental board, to-wit: the Interstate Commerce Commission, to compel production of books and papers by a private person —a railroad corporation; that case came to this Court from a decision of the District Court which decision is reported in 212 Fed. 486, and the District Court in its opinion distinctly held that the grant of a writ of mandamus is always a matter of sound discretion, and based its decision refusing the writ in part upon the unwisdom of granting the writ for the "broad and general, not to say unlimited, terms asked for * * * (which) might be perilously near the unreasonable search forbidden by the Constitution." It is true that this Court in its opinion affirming the decision of the lower Court, discusses principally the construction of the statute, and the possible unconstitutionality of the statute if given the construction contended for by the Interstate Commerce Commission. It answered, though, a suggestion by the Commission's counsel that, if it should be held that the prayer for the writ of mandamus was too broad, nevertheless the Court should have issued its writ of mandamus insofar as the relator showed it was entitled thereto, as follows:

> "As the petition in this case was dismissed by the Court below without prejudice and a new proceeding may be started,

> asking for such inspection as the law allows, we think the order of the Court refusing to grant the writ of mandamus in the particular terms prayed for in the petition and the motion for the writ should not be reversed to permit a grant of relief within the limits which the law allows as we interpret it" (236 U. S. 318, 337-338).

It is interesting in this connection to notice that between the date of the decision of the lower Court in *United States* v. *Louisville & Nashville Railroad Co.*, and the decision of that case in this Court, similar questions arose in the District Court of Tennessee in the case of *United States* v. *Nashville C. & St. L. Railway Co.* (217 Fed. 254). The District Court in that case determined the questions against the Interstate Commerce Commission on precisely the grounds that those questions were determined thereafter by this Court in *United States* v. *Louisville & Nashville Railroad Co.*, and, so determining the questions, found it unnecessary to determine whether if these grounds had not existed it would have refused to issue the writ of mandamus "in the exercise of the discretion vested in the Court in the granting of a writ of this character" (p. 265).

In the instant case Circuit Judge Manton has in his opinion (Record, pp. 37-44) sustained the contentions hereinbefore in this brief made, but in the course of his opinion he uses a sentence that constitutes an exercise, and as we conceive

a perfectly righteous and correct exercise, of the discretion that would have been vested in him upon petition for mandamus, even though the Federal Trade Commission had had by proper construction of a constitutional statute authority to make a demand, and was proceeding under the statute to enforce that demand *in invitum*:

> "It would be unreasonable and unjust to accede to the demands of the petitioner, and the application for a peremptory writ of mandamus against the respondents American Tobacco Company and P. Lorillard Company is denied" (Record, p. 44).

From our point of view, virtually the same arguments which demonstrate that the compulsory search here attempted would constitute an unreasonable search and seizure under the Fourth Amendment to the Federal Constitution, demonstrate *a fortiori* that, even assuming a constitutional statutory authority, the Court was right and should be affirmed in denying in its sound discretion the petition. To award such writ would be, under all the circumstances of this case, "unreasonable and unjust", and the Federal Trade Commission should be left to secure such information as it needs by procedure that is orderly, reasonable and proper.

The question whether a mandamus sought for the compulsory production of books and papers, should be issued, like the question whether a compulsory search and seizure is reasonable so as to

be valid, or unreasonable so as to be in contravention of the Fourth Amendment to the Federal Constitution, is to be answered after consideration of all the circumstances of the case.

> "Prohibition of unreasonable, and the sanction of reasonable, search and seizure, is simply a practical compromise between two conflicting interests" (*Federal Trade Commission* v. *Baltimore Grain Co., supra*).

It may be that in the determination of the Constitutional question of "reasonableness" or "unreasonableness" the practices, at least, of the investigating body should not be taken into account. But the Court, in the exercise of its judicial discretion as to whether or not the writ of mandamus should issue may properly take into account the power *and the practices* of the body which seeks from it this extraordinary writ. The Federal Trade Commission Act (Section 5, sub-section d) gives to the Federal Trade Commission authority to make public from time to time, "such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest." There is no question as to the propriety or impropriety of what shall be made public that is to be solved by any other than the Federal Trade Commission itself, and it is for it to determine what is and what is not a trade secret. In the petition for the mandamus in this case, reference is made to a preliminary report on tobacco matters and tobacco activities made by the Federal Trade Commission to the

Senate under date January 17, 1922, ordered by a routine resolution of the Senate, to be printed as a public document, and thereafter printed as Senate Document No. 121, 67th Congress, Second Session; and the petition for mandamus states with respect thereto: "Reference thereto is hereby made to it as such" (Record, pp. 8-9). If it is interesting to know that this respondent's repugnance to the intrusion into its own and its customers' properly private matters is concrete and substantial, and not abstract, feigned nor fanciful, reference may be made to that report. Whether it included trade secrets may be a matter of difference of opinion; but that it contained names of numerous customers is beyond contradiction; that it in any way threw light on the question presented by the Senate Resolution would be, with due respect to the Commission, difficult to maintain; that it was full of gossip of tobacco salesmen of actively competing companies, advising their respective home offices of their own activities, and of the activities of competing salesmen, in attempting to secure trade, is sure.

V.

The judgment of the District Court should be affirmed.

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